No. 84-433-CFX
Status: GRANTED

Docketed:
September 18, 1984

Title: School Committee of the Town of Burlington, Massachusetts, et al., Petitioners
v.
Department of Education of the Commonwealth of Massachusetts, et al.

Court: United States Court of Appeals for the First Circuit

Counsel for petitioner: Berman, David

Counsel for respondent: Janos, Ellen L., Rosenberg, David W.

Entry	Date	Note	Proceedings and Orders
1	Sep 18 1984	G	Petition for writ of certiorari filed.
2	Oct 31 1984		DISTRIBUTED. November 21, 1984
3	Nov 2 1984	X	Brief of respondents Dept. of Ed. of MA in opposition filed.
4	Nov 16 1984	X	Reply brief of petitioner Sch. Comm. of Burlington filed.
6	Nov 26 1984		REDISTRIBUTED. November 30, 1984
7	Nov 23 1984		Record filed.
8	Nov 23 1984		Certified copy of appendix, Volume 1, received.
9	Dec 3 1984		The petition for a writ of certiorari is granted limited to Questions I. and V. presented by the petition.
			**********
10	Jan 18 1985		Joint appendix filed.
11	Jan 18 1985		Brief of petitioner Sch. Comm. of Burlington filed.
12	Jan 30 1985	G	Motion of respondents for divided argument filed.
13	Feb 5 1985		SET FOR ARGUMENT. Tuesday, March 26, 1985. (1st case).
14	Feb 19 1985		Motion of respondents for divided argument GRANTED. Justice Powell OUT.
15	Feb 16 1985		Brief of respondent Dept. of Ed. of MA filed.
16	Feb 16 1985		Brief of respondent Robert Panico, etc. filed.
17	Feb 16 1985	G	Motion of The Developmental Disabilities Law Center, et al. for leave to file a brief as amici curiae filed.
18	Feb 21 1985		CIRCULATED.
19	Feb 25 1985		Opposition of Sch. Comm. of Burlington to motion of Developmental Disabilities Law Center, et al. for leave to file a brief as amicus curiae filed.
20	Mar 4 1985		Motion of The Developmental Disabilities Law Center, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.
21	Mar 20 1985	X	Reply brief of petitioners School Comm. of Burlington, et al. filed.
22	Mar 26 1985		ARGUED.

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Supreme Court, U.S.
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(2)

No. 84-433.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,

v.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO A/K/A JOHN DOE, SR., AS HE IS NEXT FRIEND OF MICHAEL PANICO A/K/A JOHN DOE, JR.,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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89 [illegible]

Questions Presented.

I. Under Education of the Handicapped Act (EHA), 20 U.S.C. § 1415(e)(3), where parents unilaterally decide to place a child in a private school, do they forfeit the right to be reimbursed for tuition and expenses related to such placement?

II. Where Federal law mandates a preference that a handicapped child be educated in the public schools, may a State order private school placement of a child on the basis of the local school authorities' past violations of State procedures?

III. In a trial under 20 U.S.C. § 1415(e)(2), does a court have authority to refuse to hear witnesses who testified or could have testified at State administrative proceedings?

IV. Where the Court of Appeals explicitly decided a prior appeal in this case on the ground that the parents would ultimately be responsible for the expenses of private education for their child if they did not prevail on the merits, could it in a subsequent appeal from a judgment on the merits against the parents determine that local school authorities would be liable for at least part of such expenses?

V. Does EHA provide a remedy by way of damages to reimburse parents for private school tuition and related expenses incurred in the education of a handicapped child?

VI. Are parents who unilaterally placed their child in a private school for the school year 1979-1980 and then attached patently unlawful conditions to preparing an IEP for subsequent years entitled to reimbursement of tuition and related expenses for such years?

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SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
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DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO A/K/A JOHN DOE, SR., AS HE IS NEXT FRIEND OF MICHAEL PANICO A/K/A JOHN DOE, JR.,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioners pray that a writ of certiorari issue to review and reverse a judgment of the United States Court of Appeals for the First Circuit issued on May 29, 1984 and an order of June 29, 1984 denying a petition for rehearing.

Citations to Opinions Below.

The following opinions are reprinted in the record-appendix. They are unreported unless otherwise noted.

1. Opinion of the Bureau of Special Education Appeals of the Department of Education of the Commonwealth of Massachusetts dated January 31, 1980.

2. Opinion of the United States District Court for the District of Massachusetts, Zobel, J., dated November 19, 1980.

3. Opinion of the United States Court of Appeals for the First Circuit dated June 18, 1981 and reported at 655 F.2d 428 (1st Cir. 1981).

4. Pre-trial Order of the United States District Court for the District of Massachusetts, Zobel, J., dated March 18, 1982.

5. Memorandum of Decision of the United States District Court, Zobel, J., for the District of Massachusetts dated August 13, 1982.

6. Opinion of the United States District Court for the District of Massachusetts, Aldrich, J., dated March 7, 1983 and reported at 561 F.Supp. 121 (D. Mass. 1983).

7. Opinion of the United States Court of Appeals for the First Circuit dated May 29, 1984 and reported at 636 F.2d 773 (1st Cir. 1984).

8. Judgment of the United States Court of Appeals for the First Circuit, entered May 29, 1984.

9. Opinion of the United States Court of Appeals for the First Circuit denying a motion for rehearing dated June 29, 1984.

Jurisdiction.

On May 29, 1984 the United States Court of Appeals for the First Circuit entered judgment affirming in part and reversing in part a judgment of the United States District Court for the District of Massachusetts. Plaintiffs were given until June 18,

1984 to file a petition for rehearing and filed a petition for rehearing on that date. On June 29, 1984 the petition for rehearing was denied. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutory Citations.

The following are found in the statutory appendix:

Constitution of the United States, Art. VI, Supremacy Clause.

United States Statutes: 20 U.S.C. § 1401, 20 U.S.C. § 1411, 20 U.S.C. § 1412, 20 U.S.C. § 1414, 20 U.S.C. § 1415, 20 U.S.C. § 1416.

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Federal Rules of Appellate Procedure: Rule 3(c); State Statutes; Mass. G.L. c. 71B, § 10; State Regulations: 603 C.M.R. 311, 327.1, 327.2, 330-333, 403, 409.

Statement of the Case.

In September of 1976 Michael Panico, then aged five, entered the first grade at the Memorial School, a public school of the Town of Burlington, (Massachusetts) (the Town). At the end of that school year his teacher, citing "immaturity" on Michael's part, recommended that he be considered for retention. His parents, however, insisted that he be given a core evaluation to determine whether he had a learning disability and, if so, the appropriate program of remediation. Although the parents were not informed that such an evaluation could

include an independent medical assessment, the evaluation, including a medical assessment, was carried out. At its conclusion the parents asked that no individual education plan (IEP) be drawn up. Michael was to be privately tutored over the summer.

Michael entered the second grade at Memorial School in September of 1977. In the middle of the ensuing school year, after Michael suffered a severe illness (apparently unrelated to whatever learning disabilities he had), the local school authorities drew up an IEP, approved by his parents, under which Michael remained at the Memorial School but spent some time each week in a reading clinic. The IEP was to remain in effect for the 1978-1979 school year.[1]

On May 24, 1979 Michael exhibited symptoms of serious emotional disburbance at home, after he missed recess and lunch because of routine testing that had been carried out by special education personnel. His father called the Town's Coordinator of Special Education and demanded an immediate new core evaluation, which was carried out at once. A team was convened and found that Michael suffered from serious reading disabilities. After a meeting in which his parents participated, an IEP was drawn for the 1979-1980 school year placing Michael in a special education classroom of the Pine Glen School, another public school of the Town. The IEP provided

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[1] A state hearing officer found that Petitioners had modified the IEP for 1978-1979 without the parents' consent, the time that John would have spent in the learning center with his reading tutor, Ms. Black, supposedly having been unauthorizedly shared with another student. The hearing officer seems to have misunderstood the evidence. John was not required at any time to have a single period of the day during which he was the only student working with Ms. Black. That would have been, according to uncontroverted testimony, a waste of Ms. Black's time, since part of Ms. Black's time would be spent in assigning John independent work to "reinforce" what she had immediately taught. He was, however, required to have one hour a day under her tutelage, and this he had at all times had from March of 1978 to June of 1979.

that Michael would be able to take gym with nonhandicapped children and would as soon as possible take mathematics with them as well. The parents rejected the IEP and without seeking or obtaining permission from local or state educational authorities enrolled Michael in the Carroll School, a private school in Lincoln, Massachusetts exclusively for children with learning disabilities. At the same time they appealed the IEP to the Bureau of Special Education Appeals (BSEA) of the Department of Education of the Commonwealth of Massachusetts.

BSEA designated a hearing officer to hear the appeals. After four days of hearing in September, October and November of 1979, the hearing officer, on January 31, 1980, rendered a decision that the appropriate placement for Michael was in the Carroll School and ordered the Town of Burlington and its school committee to pay for such placement. At least one problem that has plagued this controversy since then is that the reasons for her decisions were less than clear. On one hand, she indicated that she would have considered Pine Glen an appropriate placement if the Town had not been guilty of certain procedural irregularities in the way that it had handled Michael's placement especially in 1977. On the other hand, she implied that the person who would have been Michael's teacher at Pine Glen had his parents not placed him in the Carroll School did not have sufficient experience in dealing with handicaps like his.

Believing that the teacher at Pine Glen was remarkably well suited to address Michael's learning problem and that the so-called procedural violations found by the hearing officer were trivial, irrelevant, outside the scope of the notice and hearing, and totally explained by the circumstances, and that in any event the parents' unilateral placement of Michael in the Carroll School made them ineligible for reimbursement under 20 U.S.C. § 1415(e)(3), the Town and its School Committee on Febru-

ary 26, 1980 sought review in the United States District Court for the District of Massachusetts pursuant to 20 U.S.C. § 1415(e)(2). Its complaint was in two counts, the first invoking the District Court's jurisdiction under and seeking an evidentiary hearing pursuant to § 1415(e)(2) and the second invoking the Court's pendant jurisdiction, to set aside the decision under the Massachusetts Administrative Procedure Act, M.G.L. c. 30A, § 14, on the basis of errors apparent upon the record. Petitioners also sought a stay of the BSEA decision.

In July of 1980 the District Court denied a stay, and Petitioners appealed. In November of 1980, the Court granted summary judgment against Petitioners on the second count and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure entered immediate judgment, from which Petitioners appealed. Finally, in February, 1981 the District Court ordered Petitioners to reimburse the parents for tuition and related expenses incurred by them in the 1979-1980 school year and again Petitioners appealed. In February, 1981, faced with a threat by the Department of Education to cut off their Federal EHA funds (A. 40a, 71a; 655 F.2d at 430, 431; 561 F.Supp. at 124), Petitioners agreed to pay for Michael's education at the Carroll School until the end of the District Court action with the strict understanding that if they were successful in the litigation, the Panicos would repay the money.

In July of 1980 Petitioners also asked the Panicos to make Michael and the records of the Carroll School available for a ten-month evaluation. Through their counsel they refused. A few months later they asked Petitioners to write an IEP for Michael, presumably for the 1980-1981 school year and agreed to make Michael and the records available but attached to the request the condition that the persons on the team "be not adversaries in any court proceeding or under the influence of an adversary." At this time, of course, litigation between Petitioners and the Panicos was still pending, and Petitioners declined to accept the conditions. No subsequent IEP was drawn.

For reasons that are not of immediate concern, Petitioners' appeals from the denial of a stay, the judgment on the second count, and the interlocutory order for reimbursement were consolidated for decision (A. 41a; 655 F.2d 428, 431) (1st Cir. 1981) (*Burlington I*). The order granting summary judgment was vacated on the ground that 20 U.S.C. § 1415(e)(2) displaced all inconsistent state remedies and review under M.G.L. c. 30A, § 14 was an inconsistent remedy[2] (A. 41a-43a; 655 F.2d at 431-432). The order denying a stay was affirmed on the ground that Petitioners had not shown that they would suffer irreparable damage in the absence of a stay (A. 43a-46a; 655 F.2d at 432-433), and the interlocutory order for reimbursement was vacated on the ground that Respondents had not shown that they would suffer irreparable damage if reimbursement was not required (A. 46a-47a; 655 F.2d at 433-434). The Court was thus able to avoid the factual and legal merits of the controversy and returned the case to the District Court for trial.

The case was tried in May of 1982. At the time of trial Michael was completing his third year in the Carroll School, though there had been no formal placement by state or local educational authorities for years after 1979-1980. Both Petitioners and the parents presented expert testimony of a very high level and other witnesses, including the person who would have been Michael's teacher at Pine Glen; some of these witnesses had testified at the BSEA hearing. Respondent Department of Education offered no evidence. In August of 1982 the District Court rendered a decision basically finding that the

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[2] Petitioners have not presented the correctness of this ruling as a question in this petition. They suggest, however, that it was erroneous. A District Court or a state court could, prior to holding the evidentiary hearing required by § 1415(e)(2), determine that the decision of BSEA is erroneous on the face of the record and thus avoid an evidentiary hearing, either remanding the case to the agency or ordering the entry of a correct decision. See M.G.L. c. 30A, § 14(7).

1979 IEP, placing Michael at Pine Glen, would have offered him free, appropriate public education and that Petitioners could and would have implemented the IEP (A. 62a-63a). The Court also found that the parents had not met their burden of proving that the placement in the Carroll School for years subsequent to 1979-1980, as to which no IEP had been drawn, was appropriate (A. 66a). The form of the judgment became the subject of still further hearings, one of which was before Judge Aldrich, who ruled that Petitioners were not liable for any of Michael's tuition and related expenses at the Carroll School and that the parents were required to reimburse Petitioners for tuition and related expenses paid to the parents since February of 1981 except for the amounts that Petitioners had received toward Michael's education from the Commonwealth of Massachusetts (A. 84a-86a; 561 F.Supp. at 130). A judgment consistent with Judge Zobel's memorandum and Judge Aldrich's opinion was entered on May 9, 1983. Respondents appealed from the judgment generally, and Petitioners cross-appealed only from so much of the judgment as permitted the parents to subtract from what they were to pay Petitioners the sums received by Petitioners from the Commonwealth of Massachusetts toward Michael's education.

For purpose of the appeals the First Circuit, at the suggestion of the parties, treated Petitioners as appellees and Respondents as appellants. On November 8, 1983 the Court of Appeals heard oral argument. On May 29, 1984 it filed a sixty-two page slip opinion, affirming in part and reversing in part and ordering Petitioners to pay costs of appeal. Petitioners sought permission to file a fifty-page petition for rehearing but were given leave to file a petition of only twenty-five pages; the time to file it was extended until June 18, 1984. On that date the petition was filed. It was denied on June 29, 1984, although a change was made in the opinion (A. 148a).

Amplification of Reasons Relied on for the Allowance of the Writ.

I. WHERE PARENTS OF A HANDICAPPED CHILD WITHOUT PERMISSION OF LOCAL OR STATE SCHOOL AUTHORITIES PLACED HIM IN A PRIVATE SCHOOL, THEY FORFEITED ANY RIGHT TO REIMBURSEMENT FOR THE YEAR OF INITIAL PLACEMENT (1979-1980) AND FOR SUBSEQUENT SCHOOL YEARS.

The Court of Appeals stated (A. 126a-127a; 736 F.2d at 796-797):

> The Town argues that we should affirm the district court's ruling in its favor on the basis of the parents' conduct in September 1979. Specifically, it urges that because John's parents enrolled him in the private Carroll School prior to the conclusion of the state administrative proceedings, they violated § 1415(e)(3), and are therefore barred from any reimbursement relief. That section provides in pertinent part:
>
> > During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, . . . until all such proceedings have been completed.
>
> 20 U.S.C. § 1415(e)(3). In support of its position, the Town cites two Fourth Circuit cases, *Rowe* v. *Henry County School Board*, 718 F.2d 115 (4th Cir. 1983); *Stemple* v. *Board of Education*, 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981), and one Eighth Circuit case, *Monahan* v. *Nebraska*, 645 F.2d 592, 598 (8th Cir. 1980). The State and Does argue that the child has no current educational placement and that the State and parents had "otherwise agree[d]."

> We have already departed from *Stemple* and joined the Seventh Circuit in ruling that § 1415(e)(3) "establishes a strong preference, but not a statutory duty, for maintenance of the status quo." *Doe* v. *Brookline*, 722 F.2d at 918. We expressly reserved opinion on whether parental "self-help" constitutes a bar to a reimbursement remedy at final judgment. That question is now squarely before us, and we respectfully decline to follow the Fourth Circuit.

For declining to follow the Fourth, Eighth and Ninth Circuits, not to mention the clear language of Congress, the Court gave several reasons, *viz*, (a) that a member of Congress had expressed the opinion that a "change of placement should not be delayed while long and tedious appeals were being exhausted," (b) that some school districts might deliberately use the rationale of *Stemple* and like cases to avoid their duties to diagnose and place handicapped children, (c) that § 1415(e)(3) is intended to be directory rather than mandatory, (d) that irreparable damage might be done to a child who was forced to remain in an inappropriate placement until the administrative process was completed and a court could issue a preliminary injunction, and (e) that the financial risk involved in placing a child in a private school that was later found to be inappropriate was a sufficient deterrent to a hasty or ill-considered transfer (A. 128a-131a; 736 F.2d at 797-799).

We address these reasons briefly. First, we note that § 1415(e)(3) as construed in *Stemple* and like cases is not inflexible and does not necessarily bar a change in placement while proceedings are pending. The parents may change the placement while proceedings are pending provided that the local or state authorities agree to the change. There is nothing "inflexible" about asking private persons not to attempt to incur huge charges to the public fisc without official authorization; here, there is no evidence that the parents even sought such authorization before acting. Second, there is no basis for

a belief that local educational authorities will so frequently and deliberately disregard their duties toward handicapped children under Federal law that self-help is the only practicable remedy. All presumptions are to the contrary. *O'Shea* v. *Littleton*, 414 U.S. 488, 496-497 (1974); *Rizzo* v. *Goode*, 423 U.S. 362, 370 (1976); *Board of Health of North Adams* v. *Mayor of North Adams*, 368 Mass. 554, 569 (1975). Federal law, moreover, provides for serious financial sanctions against states and local school districts that do not live up to the requirements of EHA. 20 U.S.C. § 1414(b) and (d) and § 1416. Third, the Court seems to have misunderstood the powers of a district court to issue a preliminary injunction to prevent irreparable damage; if, as the Court of Appeals assumed (A. 136a; 736 F.2d at 801, n.35), a district court has power in light of § 1415(e)(3) to issue a preliminary injunction ordering a specific placement while proceedings under § 1415(e)(2) are pending, see *Stacey G.* v. *Pasadena Independent School Dist.*, 695 F.2d 949, 955, n.5 (5th Cir. 1983), the exercise of that power does not have to await completion of administrative proceedings. The rule requiring exhaustion of administrative remedies has always yielded to the principle that Federal courts have the power to issue preliminary injunctions to prevent irreparable damage to Federal rights. *Pacific Telephone & Telegraph Co.* v. *Kuykendall*, 265 U.S. 196, 201, 204-205 (1924); *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U.S. 341, 349-350 (1951) (*dictum*). The Supreme Judicial Court of Massachusetts has so construed the power of the Trial Court of Massachusetts in EHA cases. *Stock* v. *Massachusetts Hospital School*, 392 Mass. 205, 213 (1984). Fourth, Congress could have allowed self-help to parents dissatisfied with local- or state-mandated placement and allocated to them the financial risk of nonreimbursement if the self-help proved inappropriate, but in § 1415(e)(3) Congress chose to prohibit self-help. It could have enacted this prohibition for any number of reasons, any of which would be totally rational, *e.g.*, avoiding undue pressure on state and local au-

thorities to "ratify" parental decision after they were *fait accompli*, equalizing the positions of poorer parents and wealthier parents, the latter being likelier to take financial risks, avoiding totally inappropriate private school placements even where (as was *not* the case here) the public school placement was inappropriate.

The court also raised the possibility that since Petitioners had proposed in June of 1979 to place Michael in the Pine Glen rather than the Memorial School where he had spent the 1978-1979 school year, both parties were proposing a change of placement, and therefore, § 1415(e)(3) was inapplicable (A. 132a; 736 F.2d at 799).[3] Petitioners do not agree. The "placement" to which § 1415(e)(3) refers is, Petitioners submit, the placement in effect or scheduled to be in effect at the time the parents propose to make or make the change. In the present case because the parents enrolled Michael in the Carroll School during the summer recess, the placement mandated by the IEP never took effect. But this was also the case in *Monahan* v. *Nebraska*, 645 F.2d 592, 597 (8th Cir. 1981) and *Rowe* v. *Henry County School Bd.*, 718 F.2d 115, 116-117 (4th Cir. 1983), cases cited by the First Circuit as being in accord with *Stemple*. In *Mt. View-Los Altos Union High School Dist.* v. *Sharron B.H.*, 709 F.2d 28, 29 (9th Cir. 1983), also cited by the First Circuit as being in accord with *Stemple* (A. 127a; 736 F.2d at 796, n.31), the parents changed the placement at a time when there was for all intents and purposes no placement. If the First Circuit meant to say that § 1415(e)(3) applies only to a school room actually being attended by a handicapped child at the time the challenged IEP is adopted, then its judgment is still contrary to *Monahan* and *Rowe* and probably contrary to *Mt. View*. It is also contrary to sound practical considerations. In the present case for example, neither the

[3] The case does not seem to have been decided on this ground. If it had been, the *Stemple* issue would not have been "squarely" before the Court (A. 127a; 736 F.2d at 797). In *Stemple*, the local school authorities had not proposed to change the child's placement for the ensuing year.

parents nor the local school authorities wanted Michael to spend the 1978-1979 school year at the Memorial School. For reasons already given § 1415(e)(3) is rational, but to make a child stay put in a placement that neither the parents nor the local school authorities approve is close to absurd.

Finally, the Court of Appeals found it unnecessary to rule on the contention that the January, 1980 decision was a retroactive agreement that Michael be placed in the Carroll School. Even if the Court had adopted this view, its decision would have been contrary to that of *Mt. View, supra,* at 30. We assume that under the law of contracts an agreement may, if the parties so state, operate retroactively. But the word "agree" cannot be wrenched from the language of § 1415(e)(3). As this Court said in *United States* v. *Morton,* 104 S.Ct. 2769, 2773 (1984): "We do not . . . construe statutory phrases in insolation; we read statutes as a whole." If § 1415(e)(3) permitted parents to "agree" retrospectively, by prevailing at state administrative hearings or perchance by prevailing in proceedings under § 1415(e)(2), it would mean exactly what *Stemple* and other cases[4] have said that it does not mean: that parents may unilaterally place their handicapped children in private schools and hope that somewhere along the way their decision to do so will be "ratified." All of the reasons marshalled against the First Circuit's position that self-help is permissible, see pp. 10-12, *supra,* apply equally to the position that there can be retroactive agreement. Indeed, either position is contrary to 34 C.F.R. § 300.347(a)(1) and (2), which provides that "before" there is a lawful placement in a private school, *i.e.*, one approved by state or local authorities, there must first be

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[4] The Court of Appeals cited only *Monahan* and *Mt. View* and cases in accord with *Stemple*. However, the Second Circuit in *Vander Malle* v. *Ambach,* 673 F.2d 49, 52 (1982) and the Fifth Circuit in *Stacey G.* v. *Pasadena Independent School Dist., supra,* at 953 indicated in *dictum* that they were prepared to follow *Stemple*. The Fifth Circuit's *dictum* has since become holding. *Marvin H.* v. *Austin Independent School Dist.,* 714 F.2d 1348, 1353-1354 (5th Cir. 1983). See also cases cited at 1353-1354.

a meeting to develop an IEP in which a representative of the private facility participates. No such meeting can occur when parents resort to self-help and hope for retroactive agreement. This Court has just noted that EHA regulations adopted by the Department of Education "are entitled to deference." *Irving Independent School Dist.* v. *Tatro,* 104 S.Ct. 3371, 3377 (1984). Such deference is thwarted by the opinion rendered by the Court of Appeals allowing self-help.

Section 1415(e)(3) also addresses the right to reimbursement in years subsequent to 1979-1980, for which no IEP's were prepared. In *Rowe, supra,* at 118-119, the Court held that where, as here, the decision to continue private education for a handicapped child is the result of a unilateral withdrawal, the same factors that militate against reimbursement immediately after unilateral withdrawal militate against it for later years as well.

Nor is it of any consequence, as the First Circuit, concerned about "cooperative federalism", seemed to think (A. 135a; 736 F.2d at 800), that "Massachusetts regulations require that 'whenever a placement is . . . ordered [by the state agency] . . . such placement shall be made forthwith, without any unnecessary delay.' Mass.Admin.Code tit. 603, § 409.0." Section 1415(e)(3) is clear in stating that the placement shall not be changed during "the pendency of any proceedings conducted pursuant to this section." Plainly proceedings pending in court are proceedings being conducted pursuant to § 1415. If a spirit of "cooperative federalism" means that regulations adopted by the Massachusetts Department of Education can override clear and unambiguous language of a statute enacted by Congress, then at least in the First Circuit, 165 years of jurisprudence with respect to the meaning of the Supremacy Clause of the Constitution has been swept away. See *M'Culloch* v. *Maryland,* 4 Wheat. 316, 433-436 (1819); *United States* v. *Gillock,* 445 U.S. 360, 373 (1980).

II. If Massachusetts Has a Policy of Punishing Local School Authorities Who Deviate from State-Mandated Standards for the Education of a Handicapped Child by Requiring Them at Their Expense to Educate Such a Child in Private Schools, That Policy Conflicts With EHA and Is Unenforceable.

Underlying the Opinion of the Court of Appeals insofar as it is adverse to Petitioners, is the view that Massachusetts provides enforceable procedural and substantive rights for a learning-disabled child independent of federal law (A. 93a-94a, 95a-105a, 105a-120a, 133a-137a; 736 F.2d at 780-781, 782-785, 786-793, 799-801). We assume that a state may, without specific federal authorization, adopt and implement policies for the education of handicapped children as long as these policies do not directly or indirectly contravene Federal law or regulation. Here, the Court of Appeals, apparently proceeding from no other or better authority than the hearing officer's decision, ruled that under Massachusetts law where local school authorities have in their treatment of a handicapped child deviated in the past from state-mandated policies, they may, even though they have prepared an IEP that assures the child a future free appropriate education in a public school, be compelled to pay for that child's education in a private school selected by the parents.[5]

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[5] The factual underpinnings for this rule are almost totally lacking in this case. The opinion below discusses Petitioners' "deviations" in rather summary form (A. 103a-105a, 106a-107a; 736 F.2d at 786-787, 789-790). At trial Petitioners' expert on learning disabilities testified without contradiction that these deviations were trivial. All of them were totally explained by the circumstances.

Moreover, Massachusetts has no such rule. In *Isgur* v. *School Committee of Newton*, 9 Mass. App. Ct. 290, 295-298 (1980) there had been a very substantial violation of the right of a learning-disabled child: the right to have a core evaluation. The violation in *Isgur*, it will be noted, applied to the 1975-1976 school year, the very year in issue in that case. *Id.* at 291. Nothing in *Isgur* suggests that previous violations under Massachusetts law would be at all relevant to the issue of future placement. Indeed, the *Isgur* court went even further, it *denied* relief to the child's parents for reimbursement for private

If Massachusetts had adopted such a rule, see n.5, *supra*, it would conflict with Federal law. Congress has required that handicapped children be, as far as possible, educated as they would be if they were not handicapped. 20 U.S.C. §§ 1412(5)(B) and 1414(a)(C)(iv). Federal regulations require that as far as possible handicapped children be mainstreamed, *i.e.*, educated with nonhandicapped children, 34 C.F.R. § 300.550(b)(1). Requiring local school authorities to pay for their past "transgressions" toward a handicapped child, even where (as is not the case here) they are serious, by providing him with a free *private* school education is plainly contrary to the intention of EHA.[6] This would be true even where the past transgressions involved deviations from federally-mandated standards. Deviations from state-mandated standards are *a fortiori*. The statement by the Court of Appeals that "there is no claim of federal preemption" (A. 104a; 736 F.2d at 786) is contrary to arguments that were plainly made in Petitioners' brief, pp. 24-28, and pointed out again their petition for rehearing, pp. 1-9.

States are not free to adopt policies that conflict with Federal statutes, *United States* v. *Gillock*, *supra*, or Federal regulations,

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education for the ensuing year because it found that the child had not been prejudiced by the violation, serious as it was, *id.* at 298-301. The precise holding of *Isgur* notwithstanding, the Court of Appeals ruled that under Massachusetts law it was irrelevant whether the so-called deviations had resulted in prejudice to Michael (A. 104a-105a; 736 F.2d at 876, n.14).

[6] To be sure, one could imagine, if not actually cite, cases in which local school authorities over a period of time act in such bad faith toward a handicapped child that no matter how good an IEP looks on paper, reviewing agencies are entitled to doubt that the IEP will actually be implemented. Indeed, although the opinion below makes little mention of this, fear that Petitioners would not "implement" the June, 1979 IEP was supposedly one of the major factors that impelled the hearing officer to require Petitioners to educate Michael privately (A. 13a). The District Court gave careful consideration to the hearing officer's insinuations and found that the IEP not only would have given Michael a free appropriate education (A. 62a-63a) but also that Petitioners would have implemented it (A. 63a, 66a). The District Court heard testimony from virtually every teacher and administrator employed by Petitioners who would have had any part in seeing that the IEP was implemented (A. 58a).

Capital Cities Cable Inc. v. *Crisp*, 104 S.Ct. 2694, 2700 (1984). Where federal law requires that a handicapped child be educated in the least restrictive placement with the greatest possible opportunity for mainstreaming, deviations from state procedural or substantive requirements, however well intentioned these requirements may be, cannot become the fulcrum by which federal law is overthrown. Whether, as the court below ruled, "states are free to elaborate procedural and substantive protections for the disabled child that are more stringent than those contained in the Act" (A. 102a; 736 F.2d at 784-785), such "protections" cannot become the basis for repealing an explicit Federal policy. Once the District Court found that Petitioners had drawn an IEP for Michael that would have given him a free appropriate public education in a setting less restrictive and with greater opportunity for "mainstreaming" than that selected by the parents and upheld by the hearing officer,[7] it rightly gave no further consideration to the past "deviations" found by the hearing officer.[8]

III. The Restrictions Placed by the Court of Appeals on the Rights of Parties to Offer Evidence Are Erroneous.

Throughout the judicial proceedings, Respondent Department of Education took the position that the parties could not

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[7] Not only was the Carroll School a far more restrictive setting than Pine Glen, but there was uncontradicted evidence that Michael in his three years there did not progress better academically than he had in his three years at Memorial School. As already noted, the District Court found that there was no doubt about Petitioners' determination and ability to implement their IEP (A. 62a-63a, 66a).

[8] Nor was the District Court required to choose between supposedly conflicting diagnoses (A. 119a-120a; 736 F.2d at 793) in the absence of any evidence that such a choice would have affected Michael's placement in 1979-1980 or in subsequent years. Compare *Anderson* v. *Thompson*, 495 F.Supp. 1256, 1263 (E.D. Wis. 1980).

offer evidence other than the transcripts and exhibits of the BSEA hearing. The District Court was not persuaded by this argument, though its pre-trial order directed the parties not to repeat the evidence already in the administrative transcripts (A. 49a, 54a). As we have already noted, both Petitioners and the parents presented numerous witnesses at trial, and their testimony was received over the Department's objection.

On appeal from the District Court's judgment, the Department continued to press its objections and the opinion below first states on this point (A. 114a; 736 F.2d at 790).

> We decline to adopt the rule urged by defendants that the appropriate construction is to disallow testimony from all who did, or could have, testified before the administrative hearing.

It then goes on to say (A. 115a; 736 F.2d at 791);

> A practicable approach, we believe, is that an administrative hearing witness is rebuttably presumed to be foreclosed from testifying at trial. A motion may then be made to allow such a witness to testify within specified limits stating the justification for the testimony. In ruling on the motions [for witnesses to testify],[9] a court should weigh heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources.

It would appear that in requiring the District Court to rule on a motion to permit persons who testified at the administrative

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[9]The bracketed words were added by the order denying the petition for rehearing (A. 148a).

hearing to testify at trial, the Court of Appeals set forth criteria to be applied in ruling on whether persons who did not testify at the administrative hearing should be permitted to testify at trial. There seems to be logical gap between the beginning and the end of the last quoted paragraph.

In any event, we suggest that the view taken by the District Court was essentially correct[10] and that for several reasons its ruling on this point should stand. One is that the decision of a hearing officer when it is the subject of a § 1415(e)(2) action, especially if it is given "due weight" (A. 116a; 736 F.2d at 791), ought to become the "whetstone" that sharpens the positions of both its attackers and defenders. If witnesses who testified at the administrative hearing are debarred from testifying in court, the review might just as well be confined to the record and permit reversal only because the decision was unsupported by substantial evidence or otherwise tainted by error of law. If witnesses who could have testified but did not are debarred, the result is *a fortiori*. *Burlington I*, 655 F.2d at 431 (1981), totally repudiated such review, and this Court in *Hendrick Hudson District Bd. of Ed.* v. *Rowley*, 458 U.S. 176, 206 (1982), has shown that it was correct to do so. Another reason is that a court cannot carry out the legislative mandate to decide a case by the "preponderance of the evidence," 20 U.S.C. § 1415(e)(2), unless it has the opportunity to judge the credibility of the testimonial evidence. Yet a third reason is that if there is any significant delay between the administrative hearing and the trial, at least some of the same witnesses will be required to update their testimony. A fourth reason is that motions of the type contemplated by the First Circuit are likely to consume an inordinate amount of time of both lawyers and the district court not to mention, ultimately the Court of Appeals; a fifth reason is that the discretionary aspect of such

[10] Even that rule may be slightly too confining in the context of a trial. A court is not a computer and where, as here, there are 850 pages of administrative testimony, the District Court, even if it has read this testimony in advance of trial, is unlikely to recall it *in toto*.

motions is likely to result in widely different practices from judge to judge, ranging from routine allowance to routine denial of such motions. Such differences in practice will mean that in theory the same case would be decided differently, depending on whether or not the District Court was willing to let the persons who testified at the administrative hearing testify at trial.

The First Circuit did not cite a single case for the restrictions that it placed on the right of parties to offer evidence to the District Court. Other courts have simply assumed that evidence is admissible. See *e.g.*, *Kruelle* v. *New Castle County School Dist.*, 642 F.2d 687, 690 (3d Cir. 1981); *Age* v. *Bullitt County Public Schools*, 673 F.2d 141, 143 (6th Cir. 1982). The expressed fear that allowing witnesses who testified or could have testified at the administrative hearings to testify in court would turn § 1415(e)(2) proceedings into trial *de novo* (A. 115a; 736 F.2d at 791), *i.e.*, a trial in which the judge occupied the same role as the hearing officer, is unfounded. Courts can and do hear admissible evidence freely in cases in which they are nevertheless required to defer to executive or legislative decisions. See, *e.g.*, *Board of Education, Island Trees Union Free School District* v. *Pico*, 102 S.Ct. 2799, 2809, 2812 (1982); *Minersville District* v. *Gobitis*, 310 U.S. 586, 592 (1940). In § 1415(e)(2) cases, "due weight" can and should be given to state educational decisions not by restricting the right of the parties to offer evidence but by wise limitations on the use of that evidence once it is offered.[11]

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[11] Such limitations would begin, if not end, with deference to Federal and State policies concerning the means of educating handicapped children. For example, the First Circuit in this case should not have used its "expertise" to decide questions of educational policy (A. 119a-120a, 130a-131a; 736 F.2d at 793, 798).

IV. The Court of Appeals Should Have Applied the Doctrine of Law of the Case and Ruled on the Basis of *Burlington I* That Petitioners, as Prevailing Parties, Were Entitled to Be Reimbursed by the Parents for Amounts Expended on Michael's Tuition and Related Expenses.

One question before the Court of Appeals in *Burlington I* related to who should finance Michael's education at the Carroll School while proceedings continued in the District Court.[12] Respondents and the District Court took the position that Petitioners should pay until the case could be decided; Petitioners, although agreeing under duress to make payments from February of 1981 onward, took the position that they should have no responsibility for such payments. Judge Coffin's decision in *Burlington I* split the difference, so to speak. He held that Petitioners should continue to pay the costs until the case was over, but need not reimburse the parents for tuition and related expenses paid to the Carroll School prior to February of 1981. His reasoning was clear: neither Petitioners nor the parents had shown the threat of irreparable damage that were a prerequisite to interim relief. If Respondents prevailed, Petitioners could certainly reimburse them. To Petitioners' expressed doubts that the converse was also true, the Court replied that it found little reason to doubt Petitioners' "ability in the event of its ultimate victory, to collect a $7,400 judgment against an individual that the record shows to be employed by the federal government as a professional in a supervisory position" (A. 45a; 655 F.2d at 433). Plainly, the Court's entire theory on this aspect of the case was that the losing party would and could reimburse the prevailing party after a trial on the merits (A. 43a-47a; 655 F.2d at 432-434).

There was a trial and Petitioners prevailed. Judge Aldrich, to whom the issue of reimbursement was referred, ruled that

[12] Plainly the parents at this time had no intention of withdrawing Michael from the Carroll School.

the Panicos should reimburse Petitioners for the funds received from February of 1981 through June of 1982 (A. 82a-85a; 561 F. Supp. at 129-130), though for inexplicable reasons he ruled that they did not have to reimburse Petitioners for funds received from the Commonwealth of Massachusetts toward Michael's education (A. 86a; 561 F. Supp. 130).

Although one might hardly guess this from the opinion below, Petitioners argued at length in their brief that the doctrine of law of the case required the Court of Appeals to adhere to its earlier decision that the prevailing party should be reimbursed *in toto*. Of course, the Court of Appeals decided that perhaps Petitioners should not have prevailed since the District Court had erred in the manner in which it arrived at its decision. We take up the cudgels against those aspects of the lower court's opinion elsewhere in this petition.

But the Court of Appeals went further and held that even if Petitioners again prevail after further proceedings in the District Court, they will be absolutely liable for tuition and related expenses for the period from January 31, 1980 to the end of the 1979-1980 school year and possibly liable for tuition and expenses incurred thereafter (A. 135a-138a; 736 F.2d at 800-802). The Court gave no reason for departing from the law of the case founded upon *Burlington I*. The failure to offer any reason requires reversal of the judgment. Although the doctrine of law of the case may not be as inexorable as *res judicata*, see *Moore* v. *Jas. H. Matthews & Co.*, 682 F.2d 830, 833 (9th Cir. 1982), virtually every Circuit that has considered the issue has ruled that there should be no departure from the law of the case except for the weightiest reasons fully expressed. To quote the Fifth Circuit in *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 19-20 (5th Cir. 1974), *cert. denied*, 419 U.S. 987 (1974), the doctrine is "waived for only the most cogent of reasons and to avoid manifest injustice." Accord: *Carpa Inc.* v. *Ward Foods, Inc.*, 567 F.2d 1316, 1320 (5th Cir. 1978). In this case the First Circuit did not give cogent reasons or any reasons at all for departing from the holding of *Burlington I*.

V. Even Apart from the Doctrine of Law of the Case, Respondent Panicos are Not Entitled to Damages.

Departing from the holding of virtually every other circuit to consider the issue (except perhaps the Seventh Circuit), the First Circuit in effect held that parents of a handicapped child who does not receive a free appropriate public education are in some circumstances entitled to damages under EHA (A. 133a-138a; 736 F.2d at 799-801). Compare *Marvin H.* v. *Austin Independent School Dist.*, 714 F.2d 1348, 1356 (5th Cir. 1983); *Mountain View-Los Altos Union High School Dist.* v. *Sharron B.H.*, *supra*, at 30; *Powell* v. *Defore*, 699 F.2d 1078, 1081 (11th Cir. 1983); *Miener* v. *Missouri*, 673 F.2d 969, 979 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 215 (1982). At one time the First Circuit took the same position as is taken in the other circuits. *Doe* v. *Anrig*, 692 F.2d 800, 812 (1st Cir. 1982); *Colin K.* v. *Schmidt*, 715 F.2d 1, 10 (1st Cir. 1983). However, in *Doe* v. *Brookline School Committee*, 722 F.2d 910, 917, 919-920 (1st Cir. 1983) another panel of the First Circuit, not sitting en banc, compare *County of Monroe, Florida* v. *U.S. Dept. of Labor*, 690 F.2d 1359, 1363 (11th Cir. 1982), "overruled" *Doe* v. *Anrig I*, and effectively started that court on the less "constricted" road toward damages.[13] In

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[13] In that case less "constricted" than the view taken in *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981). The *dictum* in *Anderson*, *supra*, 1214 concerning when damages may be appropriate has become the "wild ass" of EHA law. The case has been cited for diametrically opposite positions. Compare *Miener* v. *Missouri*, *supra*, at 979 (stating that *Anderson* allows no damages under EHA) with *Doe* v. *Brookline School Comm.*, *supra*, at 919 (finding *Anderson's* interpretation of right to damages under EHA "constricted") with the First Circuit's opinion in the case at bar (A. 138a; 736 F.2d at 802) (allegedly following *Anderson*). That Judge Swygert sat on the panel that decided the present case on its most recent journey through the First Circuit does not alter the difficulty of applying the *Anderson* holding. *Anderson* ought to be considered a superb example of why courts should refrain from discussing issues not actually before them. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 755 *reh. denied*, 392 U.S. 917 (1968).

this case the First Circuit decided that reimbursement, *i.e.*, damages,[14] could be awarded to the parents, either through an affirmative order to repay or by absolving the parents from repaying sums received from Petitioners (A. 133a-138a; 736 F.2d at 799-802). With respect to tuition and related expenses for the period from January 30, 1980 to the end of the 1979-1980 school year, it ruled that the parents' right to damages was absolute (A. 135a-136a; 736 F.2d 800-801), reasoning, although all the evidence is to the contrary, that the parents had relied or could have relied on the hearing officer's decision.[15] With respect to damages for periods prior or subsequent to the last five months of the 1979-1980 school year, the Court held that Petitioners may end up paying damages if (a) the District Court finds that procedural "violations" enumerated by the hearing officer were "serious" (A. 138a; 736 F.2d at 802) or (b) other "equitable" considerations indicate that the parents should receive damages (A. 133a-137a; 736 F.2d at 799-801). The only "equitable consideration" squarely identified in the opinion was "whether parents made a specific proposal for a private placement and attempted in good faith to gain an agreement with the school system before moving the child"[16] (A. 133a; 736 F.2d at 799).

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[14] See, *e.g.*, *Anderson* v. *Thompson*, *supra*, at 1209.

[15] Not only was Michael's placement in the Carroll School the unilateral act of his parents but they also kept him there in years subsequent to 1979-1980 and refused to cooperate in preparing an IEP for those years. See Argument VI, *infra*.

[16] The parents offered no evidence at the administrative hearing or trial that they made a specific proposal and attempted in good faith to gain an agreement before making the move. At the administrative hearing, Mr. Panico gave a detailed chronology of Michael's problems in the Town's public schools and of his responses to those problems. The chronology spanned the period from the spring of 1977 to the late summer of 1979, but there was no mention of any effort to reach agreement concerning placement in the Carroll School. If evidence of efforts to gain an agreement was relevant, the parents ought to have offered it at trial or at least at one of the post-trial hearings on the subject of damages. A remand to develop a factual position advanced neither at trial nor on appeal is, to say the least, anomalous. See *Whittaker Corp.* v. *Execuair Corp.*, 736 F.2d 1341, 1346 (9th Cir. 1984).

Perhaps there is no clearer indication of how right the *Stemple* court was than the tortuous path taken by the First Circuit in its efforts to arrive at the meaning of § 1415(e)(3). *Stemple's* bright red line prohibiting self-help not only effectuates the language of Congress, see Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv. L. Rev. 892, 894-895 (1982), but avoids the Byzantine distinctions that are likely to follow the First Circuit's opinion as district courts try to determine when damages may or may not be awarded. To speak of awarding damages on the basis of discretionary equitable considerations is virtually to stand Anglo-American jurisprudence on its head. Damages, even in courts of equity are, when proven and allowable, traditionally a matter of right, not a discretionary balancing of equitable considerations. See, *e.g.*, Note, The Right to Jury Trial In Enforcement Actions Under Section 502(a)(1)(B) of ERISA, 96 Harv. L. Rev. 737, 752-753 (1983). Moreover, that the court below was able to locate only one such equitable consideration, whether a parent had made a proposal and tried to get local school authorities to agree to it, is indicative that such considerations are difficult to locate, much less apply. Nor does the First Circuit explain why parents who try to bring local school authorities around to their proposals are behaving more equitably than parents who simply carry out their proposals as did the Panicos and then seek relief. Yet another problem with this particular consideration is that it may, in many cases, be impossible to determine where attempting in good faith to gain agreement ends and settlement negotiations begin. The latter are plainly not a subject for the court's consideration, ever. Rule 408 of the Federal Rules of Evidence.

Nor should even serious procedural violations of State- or federally-mandated rights of a handicapped child give rise to a cause of action for damages. Contrary to the explicit view taken by the First Circuit (A. 104a-105a; 736 F.2d at 786, n.14), procedural violations are meaningless in the absence of evidence that these violations resulted in harm to the child.

See n.5, *supra*. It has been almost invariably true that when this Court has found that a Federal statute or regulatory scheme creates a private remedy for damages, the remedy is restricted to one who can prove that there has been a breach of a statutory duty *and* that he has been damaged in consequence of that breach. *E.g., Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916). On the other hand, if there has been a serious breach of the duty owed by local school authorities to a child under EHA, the child is being immediately harmed by that breach, and the administrative remedies are inadequate to deal with that harm, the relief lies not in self-help and compensatory damages but in immediate recourse to the injunctive powers of a state or Federal court. *Stock* v. *Massachusetts Hospital School, supra*. The ultimate issue in any case in which the parents reject an IEP calling for public school placement is whether the rejected IEP offered the child a free, appropriate public education. If it does, and the District Court here found that the IEP rejected by the parents certainly did (A. 62a-63a, 66a), local school authorities cannot be expected to fund expensive private school education to vindicate an erroneous choice made by the parents. Even when a rejected IEP does not offer an appropriate education and the conditions for injunctive relief are not met, the remedies provided by EHA and corresponding provisions of State law should prove adequate.[17]

We finally approach the issue of whether damages are appropriate to reimburse the parents for a period during which a child is in a placement selected by them, approved by BSEA, but on judicial review found to be less desirable than that selected by local school authorities. Again, if *Stemple* is controlling, damages are not appropriate. Even if *Stemple* is not

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[17] 603 C.M.R. 403.0 requires BSEA to decide appeals in twenty-five days. Although it has been held that the failure to act within that time does not deprive BSEA of jurisdiction, *Amherst-Pelham Regional School Committee* v. *Department of Education*, 376 Mass. 480, 496-497 (1978), a judgment in the nature of a writ of mandamus would almost certainly issue to compel BSEA to decide an appeal within the time required by law. *Rea* v. *Aldermen of Everett*, 217 Mass. 427, 428, 430-432 (1914).

controlling, the First Circuit was, we suggest, wrong. What § 1415(e)(3) requires before there can be change of placement is not merely that the parents have convinced the person conducting the due process hearing, § 1415(c)-(e), that the rejected IEP was inappropriate, but that state or local school authorities agree with the parents to a changed placement pending judicial review. In this case no such agreement was ever called to the District Court's attention. The fair assumption is that in fact it never was obtained.[18]

The reason for not awarding damages under EHA was plainly stated in *Mt. View, supra*, 709 F.2d at 30, from which we quote:

> Damage remedies for placement before full compliance with EAHCA procedures are not in keeping with the design of the Act. A damage action is usually associated with the breach of some duty, or creation of an unusual risk as by engaging in an ultrahazardous activity. Damages serve not merely to compensate an injured party but also act as an incentive for potential defendants to act prudently. See, *e.g.*, 42 U.S.C. § 1983. Damages under EAHCA would serve no purpose. The prudent school

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[18] Perhaps for the reason that Massachusetts does not seem to have provided for state-authorized agreements to change the placement after administrative hearings have been completed. Compare 603 CMR 327.1 (allowing for good cause change of placement of child in regular program on request of parents or school committee pending administrative proceedings). But see 603 CMR 327.2 (placement of child, like Michael, in special education program should, pending administrative proceedings, be in regular program at parents' request, which is subject to review at the behest of the school committee). There appears to be no provision for state authorities to agree to place a child who is already in a special education program in a different special education program while administrative or judicial proceedings are pending. Massachusetts General Laws c. 71B, § 10 seems to address only the situation in which both the parents and the school committee agree on private education. It may be that Massachusetts has adopted no regulations providing for State agreements with parents concerning placement pending § 1415(e)(2) proceedings because it takes the position, see 603 CMR 409.0, that immediate implementation of administrative decisions is required. That position, however, is in conflict with federal law. See Argument II, *supra*.

> district need not do more than faithfully apply the procedures of EAHCA. The threat of damages in a case like ours would not make compliance any more likely, and would subject school districts to contingent liabilities hardly foreseeable when the annual school budget is prepared.

The First Circuit's award of damages in this case should, therefore, be reversed.

VI. Where the Parents Were Very Clear that They Would Not Cooperate in Any Effort to Compose an IEP for the Years Subsequent to 1979-1980, They Are Not Entitled to any Reimbursement for Monies Spent on Private Education for Those Years.

The First Circuit accepted the contention made by Petitioners in their brief that local school authorities should continue to prepare an IEP for a handicapped child while review proceedings are pending (A. 122a; 736 F.2d at 794). It also recognized that no IEP for a subsequent year to 1979-1980 was prepared in the present case but that Petitioners had attempted to carry out a ten-month evaluation[19] and the parents refused to make Michael available for such an evaluation (A. 121a, 122a; 736 F.2d at 794-795). After this recognition, at A. 123a; 736 F.2d at 795, the Court makes a most remarkable statement, which we quote:

> The regulations plainly prescribe that IEP review shall occur regardless of whether parents participate or whether a reevaluation of the child occurs. The Town's IEP responsibilities were therefore not excused by the parents' refusal to make [the child] available, and accordingly no advantage should accrue to the Town by dint of its failure to prepare IEPs during the subsequent years of this litigation.

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[19] A ten-month evaluation may lead to an amended IEP. 603 CMR 333 *et seq*.

It does not say how Petitioners could have prepared an IEP for Michael when his parents not only refused to make him available for any evaluation but also declined to furnish any of his records at the Carroll School.[20]

We are constrained to say that the First Circuit fudges the record on this point. It is true that Petitioners never specifically mentioned an IEP in talking about a ten-month evaluation. On the other hand, it is equally true that the Panicos, through their attorney, on August 21, 1980 responded by saying that they would not provide Petitioners with "reports or other information." Four months later, on December 7, 1980, the Panicos again addressed this issue through their attorney demanding that an IEP be drawn. They even offered to make records available to help Petitioners to draw an IEP. However, a condition attached to the offer was that "the persons compiling the information and drafting the plan be not adversaries in any court proceeding or under the influence of an adversary." In other words, no employee of or consultant to the Burlington public schools could participate in drawing an IEP. Petitioners rejected any scheme under which, in order to draw an IEP for Michael, they would effectively have had to hire a team that had no connection with their public schools. To justify that rejection one need not look beyond the point that the type of "team" demanded by the parents would have violated state and Federal law. 34 CFR 300.347(a) and 603 CMR 311.0 *et seq.*

It is a perhaps universal truism of administrative law that parties who decline to comply with the "housekeeping" rules

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[20] At 736 F.2d at 795, n.27 (A. 123a), the Court suggests that Rule 35 of the Federal Rules of Civil Procedure might be used by school authorities in litigation with parents to obtain the information needed to prepare an IEP. Congress could not have shared this thought since it allowed § 1415(e)(2) actions to be brought in state courts including those that might not provide for Rule 35-type examinations. Beyond that, the First Circuit's suggestion is shocking. The purpose of the discovery rules is preparation for summary judgment or trial, and they should be used for no other purpose. *Cf. Joy* v. *North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied sub nom. Baldwin* v. *Joy* and *Citytrust* v. *Joy*, 103 S.Ct. 1498 (1983).

prescribed by or for agencies forfeit their rights to the benefits that such agencies might otherwise be obligated to confer. See *e.g., Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981); *MacDonald* v. *Board of Assessors of Mashpee*, 381 Mass. 724, 725 (1980) (*dictum*). As *Schweiker* indicates, the forfeiture may result even when the noncompliance is plainly inadvertent. But there was nothing inadvertent about the Panicos' refusal to allow Petitioners to prepare a lawful IEP. Instead, their position seems to have been adopted as a strategy of litigation designed to keep Petitioners from finding out how Michael was progressing at the Carroll School and, perchance, preparing an IEP that would have called for placement other than at the Carroll School. As the First Circuit was compelled to recognize (A. 120a-124a; 736 F.2d at 793-795), the absence of an IEP for years subsequent to 1979-1980 greatly frustrated a judicial determination of what was an appropriate placement after 1979-1980. Having succeeded by their own efforts in frustrating the judicial process, the Panicos are not entitled to damages for expenses incurred in those years.

Conclusion.

For the reasons given, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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MASSACHUSETTS DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: Michael P. BSEA # 2867

DECISION

This decision is issued pursuant to the requirements of MGL c. 71E, c. 30A and the regulations thereto.

An educational plan proposed by the Burlington Public Schools for Michael P. and rejected by his parents was the subject of hearing on September 26, October 30, 31, and November 1, 1979 convened at the Administration Building of the Burlington Public Schools, Burlington Massachusetts. The record remained open for receipt of closing statements and was closed on November 30, 1979.

Unless otherwise noted, the following persons attended on the above dates:

Gerald B. Gallagher	— Attorney for Parents
Evelyn Doherty	— Advocate, Federation for Children
Robert P.	— Father
Roseann P.	— Mother
Ira T. Lott, M.D.	— Pediatric Neurologist, M.G.H. (9-26)
Katherine Black	— Learning Disabilities Tutor (9-26)
Sharon Marsh	— Education Director, Carroll School (10-31)
Aaron Berman	— Town Counsel, Burlington (9-26, 10-31)
Colette Manoil	— Town Counsel, Burlington (10-30, 31 and 11-1)

Kevin Foley	— Director of Pupil Personnel Services, Burlington
Jean Arin	— Team Evaluation Administrator, Burlington
Patricia Meade	— Language Pathologist, Burlington (9-26, 10-30, 31)
John McAleer	— Generic Specialist, Burlington
Gail Mason	— Learning Center Specialist, Burlington (9-26, 10-30, 31)
Thomas Michael	— Superintendent of Schools, Burlington (11-1)
Deborah D. Blumer	— Hearing Officer, BSEA

ISSUES

1. Whether the educational plan and placement proposed by the Burlington Public Schools, a 502.4 prototype at the Pine Glen School, is adequate and appropriate to meet Michael's special needs.
2. Whether the Burlington Public Schools have violated the procedural requirements of Ch. 766 in significant and prejudicial ways.
3. Whether, in the alternative, the Carroll School, a 766 approved private day school is the least restrictive, adequate program and placement which meets Michael's special educational needs.
4. Whether, Burlington Public Schools is responsible for payment of certain evaluations.

PRELIMINARY STATEMENT

Michael is a nine year old boy who had attended the Memorial School in Burlington for grades kindergarten through three. He received remedial reading assistance through the school's

Title I program in grades one and two. Burlington wrote an IEP in March 1978, during Michael's second grade year. The plan (502.2 prototype) provided individual reading instruction with Ms. Black, a special educator trained in learning disabilities, and small and large group counseling with Ms. Fourn the school's guidance counselor. Said plan remained in effect through June, 1979. A new IEP (502.4 prototype) for 1979-1980 recommended transfer to the Pine Glen School in Burlington and placement in Mr. McAleer's classroom for all academic instruction. Michael's parents rejected the plan and enrolled him in the Carroll School, a 766 approved private day school in September, 1979.

ANALYSIS OF THE EVIDENCE

This Analysis is organized into sub-sections in order to focus more clearly on the nature of Michael's special needs, the adequacy of Burlington's educational plan and issues of compliance with law and regulation. The record includes more than 80 separate exhibits and approximately 18 hours of testimony.

I. Nature of the Student's Special Needs

Parties substantially agree on several points:

1. Michael has a learning disability and reading disability (stipulation).
2. Despite provision for special education services, Michael has not made sufficient progress in reading (testimony, Ms. Arin, Ms. Black, Dr. Lott, parents).
3. Michael is unable to apply previously learned skills in reading to daily classroom performance on a consistent basis (testimony, Ms. Arin, Ms. Black).

4. Michael had been achieving at or above grade level mathematics; recent test results show some regression (Teacher report, Spring 1979 test results).
5. Michael has "above average" to "superior" intelligence, according to testing, with no significant difference in verbal and performance scores (S-3, S-15).
6. Michael is easily distracted (Teacher report, assessments).
7. Michael needs a structured, supportive, small group learning environment with strong teacher supervision (testimony, Ms. Arin, Mr. and Mrs. P.; Report, Mr. Kavanaugh, S-38).

School records and parent testimony show that Michael enjoys sports and the outdoors and takes pride in those areas where he is successful. Dr. Lott, pediatric neurologist and Massachusetts General Hospital (MGH) testified that Michael is "neurologically immature" in areas "subserving the function of reading." He characterized Michael's learning disability as "severe," based on Michael's slow progress given his general intelligence.

School assessments in June, 1977, do not identify any significant learning disability, although relative weaknesses were found (S-3). In January 1978, MGH testing at the Cortical Function Test Laboratory (CFTL) found evidence of crossed dominance, left-right confusion, reversals and difficulties in sequential memory (S-15). School evaluations in Spring 1979 report "a possible deficit in Michael's short term memory abilities may be interfering with his academic performance (S-37, pp. 90-99). Although a 1977 evaluation by the school recommended "materials should be taught visually whenever possible," (S-3), the school in 1979 noted a "question of visual memory problem that may interfere with academic progress" (S-37, pp. 100-105).

Burlington in May, 1977 recommended that Michael be retained in grade one (prior to any 766 evaluation), citing "overall immaturity" (P-2,11). Yet, Mr. Kavanaugh, school

psychologist, evaluated Michael in June 1977 and wrote: "Michael's responses to most items (on sentence completion projective tests) were typical for a boy of his age. . ." He noted some immaturity in attitude toward possessions, but concluded that "emotional issues in and of themselves should not affect his academic performance" (S-3). Mr. Kavanaugh's May, 1979 re-evaluation of Michael showed significantly increased concern about Michael's emotional growth, despite less than ideal test conditions.

> Michael perceives expectations for his performance, especially in the academic area, that he does not feel he can meet. He becomes anxious and because of this and depression he has difficulty focusing his attention on the task and exerting enough energy to meet success (S-38, pp. 105-106).

Dr. Eisenthal, psychologist at MGH, conducted a further evaluation in early summer 1979. He found Michael's "response to achievement stimuli was positive, but somewhat passive . . . Michael is . . . somewhat anxious . . . somewhat immature . . . his current difficulties in reading do not seem to be affected in a significant way by personality difficulties" (S-64, pp. 81).

The phrases "distractibility," "difficulty in attending to task" pervade the classroom performance reports from kindergarten onward (S-73-82); instances of inattention were found by evaluators at MGH and Burlington, even though no external stimuli were present (S-3, S-15). Parties agree that Michael is "unusually susceptible" (in Dr. Lott's words) to losing concentration. There is further agreement that Michael needs close supervision to control his distractibility and that he does not work well independently (S-15, S-35, pp. 78-82).

Early reports indicate the environment most conducive to Michael's learning was one-to-one for brief periods (S-3); later

reports suggest small group learning (S-35, pp. 78-82). Dr. Lott testified that Michael can learn in a small group setting and that one-to-one instruction is not essential.

A review of academic achievement testing supports the agreement of parties that Michael's progress was insufficient and that the gap between actual grade level and performance was increasing. At the end of the first grade, he was reading at "preprimer" to "primer" levels, with grade level math skills. His skill level in phonics is unclear (S-3). At mid-second grade, scores from MGH show early second grade equivalence in word reading, paragraph meaning; oral reading and dictated spelling (S-15). California Test of Basic Skills scores in April of the second grade indicate beginning second grade reading scores with mathematics scores at grade level. Other tests were administered, but the record is unclear as to dates and test conditions (S-25, 34). In Spring of grade three, scores are scattered from late first to mid second grade levels skills in reading comprehension, word recognition, oral reading, and spelling; Michael achieved at 3.3 grade equivalency (34%ile) in mathematics (S-37, pp. 88; S-37, pp. 102; S-83, pp. 208). It should be noted that scores stem from various instruments, making precise comparison impossible. Ms. Black testified that she did not conform to testing conventions in her administration of the Spache Diagnostic Test.

II. Evidence of Adequacy of the Educational Plan for 1979-1980

Ms. Arin, Core Evaluation Coordinator testified that she wrote the educational plan for Michael incorporating all of the available information. Neither Dr. Lott's most recent written report nor Dr. Eisenthals' psychological report were ready in late June, but neither would have required a change in the plan, according to Arin. The plan, Arin said, provides a "highly

structured academic program" within a supportive environment aimed at helping Michael find success in academics as well as addressing behavioral issues. She was concerned about Michael's "limited progress." Ms. Arin stated that other (i.e. less restrictive) options were not considered for a "combination of factors." Michael's reading disability was "more pronounced," with the gap between his performance and grade level growing; Michael's emotional state and sense of "self worth," had deteriorated. She noted academic testing "seems to indicate some gains," but classroom performance did not show "application of skills to everyday reading."

The parents argued that the plan was deficient in not specifying materials, particular methodologies, three, six, nine month timelines for objectives. Counseling services recommended by a team member were not included. The parents believed the placement recommendation had been governed by Mr. Kavanough's findings and that the placement was designed to deal with students with substantial emotional or behavioral problems.

There is no dispute that the focus of the written plan on reading and related skills is appropriate. The first nine general objectives reflect this emphasis. The parents questioned Burlington's capacity to implement such general objectives within Mr. McAleer's classroom. The question was central to the appeal.

Mr. Foley agreed that in prior years Mr. McAleer's class has been called the "primary adjustment class." This was no longer true, he said. He estimated that 70-75% of the students in the class had some form of "adjustment" need. Ms. Black, the learning disabilities teacher who had worked with Michael for over a year, including an unpaid summer tutorial, testified that the placement was inappropriate for Michael. She based her opinion on participation in the evaluation of another child in the group whose needs, she asserted, conflicted with Michael's.

She had not observed Mr. McAleer's class in any formal way. Neither the psychologists nor Michael's guidance counselor testified.

Mr. P. and Evelyn Doherty advocate observed Mr. McAleer's class in the fall (Mr. P. was scheduled to visit in June, but cancelled the appointment.) Ms. Doherty testified that the environment was "relaxed" and "unpressured" that children gained Mr. McAleer's almost immediate attention. Both she and Mr. P. observed play activities and other behavior they thought distracted one child and would distract Michael. Ms. Doherty stated that at least one child had needs and educational goals incompatible with Michael's. This view was based both on her review of educational plans for other students in the class and on her observations. Ms. Doherty believed the placement was not academically stimulating for Michael, particularly in view of his greater math skill.

Mr. McAleer stated that the visit of Mr. P. and Ms. Doherty had been distracting to the students and that some students were "acting" for the observers. He strongly disagreed with the view that the needs of current students would not be compatible with Michael's needs. He focused his work on academics, although like other teachers, he structures the environment for emotional and behavioral needs. Mr. McAleer uses a contracting and reward system for both academic and behavioral objectives.

His class enrollment of seven students includes: one child who is totally "mainstreamed" for academic subjects: two children with learning disabilities similar to Michael's — one of whom, a seven year old, would use the same reading program; one child who needs a "reality based" program but is not disruptive, one child who had significant behavioral problems, but whose inappropriate actions have diminished; one child with combination of "perceptual" and "conceptual" difficulties; two students with various combinations of academic and emo-

tional needs. With one exception, the students have average to above average intelligence.

According to the plan, Michael would attend his class for all academic subjects, as well as an affective education component. The daily schedule includes 1½ to 2 hours of reading, with additional time allotted for language arts, spelling, etc. An aide is present during the reading period so that the student/teacher ratio is 3 or 4: 1. Michael would have at least 15 minutes per day one-to-one instruction in reading on average. The parents noted that the previous plan provided one-to-one instruction one hour per day, with one-half hour actually delivered. Mr. McAleer stated that the difference in time was more than compensated by the consistency of the program.

The base of Michael's reading program would be the Helen Grush method; Ms. Black had used the Orton-Gillingham method during the prior year and one-half. Mr. McAleer is not trained in the latter method; He had taught three children in five years with learning disabilities similar to Michael's and had used the Grush method with five children in three years. Michael's reading skills would place him at or near the bottom of the class. Mr. McAleer stated that the highly individualized nature of his instructional program minimizes any student's negative comparison of himself/herself to others.

Mr. Foley and Mr. McAleer testified that the Pine Glen program offered almost immediate potential for integration into regular education class, with mathematics suggested in Michael's case.

Mr. McAleer's class schedule is 15-20 minutes shorter than the regular school day. The records and Mr. McAleer's testimony show no recommendation that Michael needs a shortened day. Mr. McAleer surmised that transportation schedules dictated the time differential. The ages of students in the class span seven to eleven years.

The record includes testimony, written reports and a draft educational plan from the Carroll School. The program provides small group instruction in a language based program. The Orton-Gillingham method is used in reading and language arts instruction. Students are grouped according to age and skill level. Counseling services are available on a consulting basis to teachers or directly to students if needed. Individual tutoring in reading and spelling is accessible as well. Teachers report Michael is highly distractible but that he has responded favorably to firm limits. Ms. Sharon Marsh, Education Director at Carroll testified that Michael has "adjusted very well," is "making friends," and is "completing assignments." She emphasized that it was important to students with learning disabilities "to perceive themselves as like others."

III. Issues of Compliance with Law and Regulation

A. In May 1977, Burlington recommended that Michael be retained in grade one and issued an "educational plan." Parties concur that this was not an educational plan within the meaning of Chapter 766.

B. Parties agree that no educational plan or finding of no special need resulted from the June 1977 core evaluation requested by the parents.

C. The parents contend that in the Fall 1978 a substantive change was made in Michael's education plan without their knowledge or consent. Michael's plan had stated: "Reading — Individual one hour per day" (S-18). Ms. Black and Ms. Mason, Learning Center Teacher, testified that during the period March 1978 — June 1978, Michael worked in the Learning Center with Ms. Black with no other child assigned to Ms. Black for approximately one hour per day. In Fall, 1978, a second child was assigned to Ms. Black for approximately half the period, despite her protests (testimony,

Ms. Black). The parents first learned of the "change" in May, 1979, when informed by Ms. Black. Mr. Foley and Ms. Mason assert Michael's instructional time was not reduced. Ms. Black had always taught Michael directly for one-half hour after which he would work on various materials under her supervision. Ms. Mason noted Michael's distractibility and his distraction of other students. Mr. Foley agrees that there was a "reallocation of Ms. Black's time."

D. In Spring 1979 Ms. Meade and Ms. Mason conducted certain evaluations. They testified these evaluations were not part of an evaluation pursuant to Chapter 766, but were part of retention considerations. The parents contend they were not informed nor gave prior consent for these evaluations. The record does not include any written consent of the parents.

E. In June 1979 Burlington proposed an educational plan for a 502.4 prototype, Ms. Arin desired a full revaluation for Michael and offered to arrange this with evaluators separate from those who had conducted prior assessments. Ultimately she and the parents agreed to Dr. Lott's coordination with MGH staff. Dr. Eisenthal's psychological evaluation is the only further evaluation in the record. Dr. Lott testified that he did review school results with other MGH staff. The record does not include new medical and home assessments. The parents claim these should have been conducted prior to a 502.4 recommendation.

F. Parties concur that there was no one time where all of the school staff involved with Michael's evaluations in Spring 1979 met to discuss his needs. Assessments were shared with the parents at smaller meetings. The parents contend they were not invited to a meeting to write an educational plan.

G. Parties agree that the range of students in Mr. McAleer's class exceeds 36 months. Mr. Foley testified the Regional Office of the Division of Special Education conducted a compliance review during 1978-1979, and did not cite this age

span as a non-compliance issue. Asked whether he had applied, or intended to apply for a waiver of the regulatory maximum age range, Mr. Foley replied "No."

H. The parents contend they were not at the time of their initial request for an evaluation (June, 1977) informed orally or in writing fully as to their rights in the process. Ms. Arin testified that normal procedure was to hand deliver or mail "SPED form 766-6" (a three page or three sided Department of Education Notice of 'Rights of Parents'). To the best of her recollection she had given this to Mrs. P. in June 1977. Ms. Arin testified that she could not recall any further conversations with the parents or transmission of written information about independent evaluations until May, 1979. The parents produced their original document, a one page, single sided sheet.

I. Based on H. above, the parents assert that Burlington is fiscally responsible for certain evaluations conducted by Dr. Melvin Levine, Michael's Pediatrician in June 1977; Dr. Ira Lott on December 16, 1977; the Cortical Function Test Laboratory at Massachusetts General Hospital on January 9, 1978. The school committee asserts it was not given adequate notice of this issue and that the issue before the hearing officer is adequacy the 1979-1980 IEP rather than events of prior years.

SUMMARY OF POSITIONS

School:

1. That the educational plan prepared by the Burlington Public Schools is more than adequate to meet the special needs of Michael P.

2. That the classroom assignment within the IEP is appropriate

3. That the Burlington Public Schools has the capacity to implement the IEP.

4. That Burlington Public Schools has the flexibility to assure modification of the plan to meet changes in educational needs

5. That Carroll School is not the least restrictive adequate placement

6. That issues of financial responsibility for specific evaluations are not properly a subject within this hearing.

Parents:

1. That the educational plan is inadequate to meet Michael's special needs

2. That the educational placement is inappropriate

3. That Burlington does not demonstrate the capacity to provide for Michael's effective educational progress

4. That Burlington is responsible for reimbursement to the parents for expenses of certain evaluations

5. That the Carroll School is the least restrictive, adequate program and placement which can meet Michael's special needs.

CONCLUSIONS AND FINDINGS

A decision in this appeal would be difficult were a determination to rely solely on the adequacy of the 1979-1980 IEP Burlington has proposed for Michael P. The plan provides a radically different program from past efforts that parties agree did not ameliorate Michael's special needs. I might have acceded to Burlington's suggestion to try the new program, had the record supported Burlington's capacity to comply with educational and procedural mandates on Michael's behalf. On the contrary, I find substantive and continuing procedural irregularity. This circumstance combined with doubts that Mr. McAleer's classroom is an appropriate placement, lead me to

conclude that the IEP is inadequate to give reasonable assurance of Michael's educational progress. I further find the Carroll School is the least restrictive adequate program within the record.

THE PLAN

All testimony supports a view that Mr. McAleer is an excellent teacher. My conclusion that placement in Mr. McAleer's classroom is inappropriate is heavily weighted by two factors: (a) Evidence that McAleer has very limited experience in teaching students with Michael's particular learning disabilities and in using the proposed reading methods; (b) Evidence of a lack of a peer group with similar need for a focus on reading objectives and with whom similar teaching methods would be employed.

Mr. McAleer testified that he had taught just three children in five years with learning disabilities similar to Michael's; that he had used the Grush reading method for five children in three years. While he has had several courses in reading, he is not trained in the Orton-Gillingham method. There is no evidence showing a need to change Michael's current instruction in the Orton-Gillingham method. On the other hand, there is testimony from Ms. Black and Mr. McAleer that Michael would benefit from consistency. Michael has a history of slow progress in reading, even though he worked with reading and learning disabilities specialists. Massachusetts General Hospital staff additionally state a need for assistance through specialists skilled and experienced in learning disabilities (P-29, 30, 31).

Considerable testimony centered on the student composition within Mr. McAleer's class in relation to Michael's needs.

> The grouping of children in each program shall be compatible with the methods and goals stated in each child's IEP. (§ 502.4(d), Ch. 766 regulations)."

Parties have stipulated that Michael has a learning disability in the area of reading and related language arts skills. In finding that a peer group with similar needs is important to Michael, I am influenced by the most recent teacher reports stating that the setting most conducive to Michael's learning is small group instruction, that Michael "does not work well independently" and needs ample supervision to complete work (S-p.79). Dr. Lott testified that Michael can learn in a small group. Myra Fournier reported that Michael is highly competitive. Mr. Kavanaugh and Dr. Eisenthal noted Michael's motivation for academic performance is not strong; Ms. Black and others cited his self-esteem needs and awareness of his reading deficits. Parties agree that Michael did not progress sufficiently with a highly individualized program with Ms. Black. A small group reading program composed of students with similar disabilities and achievement levels would, I find provide an environment where Michael can experience success and can channel his competitive urges into active, positive motivation toward academic learning. Mr. McAleer's reading instructional program is highly individualized. Although several students have reading deficits, Michael's skills are lower than five of six students, and only one child uses the same reading materials. Just two children have learning disabilities. It seems clear that Michael would not have an opportunity for extensive group work in reading within the class. Even if a group structure were possible, the skill variance among students might have the effect of increasing Michael's frustration. I am additionally concerned that a highly individualized program may not be appropriate for a student who does not work well independently.

I note Michael's greater skill in mathematics and the school committee offer to place Michael in a regular math class. However, records show a relative decline in math scores and class performance related to Michael's distractibility even in a small group. I therefore find that integration into a regular math class would not be an appropriate action at this time.

Asked about alternative programs within the public schools, Mr. Foley suggested more integrated programs with resource room assistance. The descriptions were vague on the record leading to my conclusion that Burlington cannot provide an adequate and appropriate program. The record shows that the Carroll School does employ small group instruction, matching student's performance levels and needs to a greater extent than identified in Burlington. The emphasis of the total program is remediation of disabilities with focus on reading and related skills.

In reaching my conclusions I examined closely the testimony regarding the emotional or behavioral characteristics of students in Mr. McAleer's classroom. Evidence of behaviors that might distract Michael conflicts. While there is evidence that some students have pronounced emotional needs, there is no solid evidence that these needs, in and of themselves, would make the placement inappropriate. Parties agree that Michael could benefit from an emotionally supportive, success oriented environment. I note, as well, that objectives designed to help Michael deal with frustrations in the learning environment were to be implemented through an affective education component. Carroll School includes a similar class. This decision does not rest on discriminating between Michael's emotional needs and those of other students in Mr. McAleer's classroom.

My finding that the placement is not adequate is influenced by another factor. There is no testimony or evidence showing a need to shorten Michael's school day. I am concerned by Mr. McAleer's testimony that transportation schedules, rather

than Michael's needs dictated a program 15-20 minutes less than the regular school day.

REGULATORY REQUIREMENTS

1. I find the school system has exceeded the maximum 36 months chronological age span in Mr. McAleer's classroom in violation of section 502.4(c) of the 766 regulations. Section 204 requires a school committee to notify the Regional Office of the Division if there is a need to gain an exception to the regulations. I note that the Pine Glen School is organized for grades K-4, which would indicate a normal upper age limit of nine or ten, while Mr. McAleer has at least one student at age eleven. While the particular needs of students may indeed justify an exception, it is the responsibility of the school committee to seek such approval. I am most disturbed by Mr. Foley's response that he does not intend to request approval. I note Mr. Foley's statement that the Division's Compliance Review did not cite a non-compliance last year. This is irrelevant under the requirements of 204 and division policy directing annual reapplication.

2. I find the school committee in violation of regulations Ch. 766, § 317.0-317.5, 505.5; 45CFR 121a.500 these sections require parental notification and written consent to evaluations which are, or may be, used to determine classroom placement and program. The parents assert that they were not notified nor gave written consent prior to evaluations conducted by Ms. Meade and Ms. Mason in the Spring, 1979. The absence of records within the hearing supports their contention. Both specialists contended their assessments were part of retention considerations, rather than specified education issues. I am not persuaded by this argument, particularly since the IEP in June 1979 incorporates their findings.

Some comment is necessary regarding a seemingly artifical segregation of recommendations for retention from the Team evaluation process contained in Ms. Arin's testimony. Clearly the regulations of Chapter 766 intend for a school to consider referral for evaluation of children who are at risk of non-promotion (Ch. 766, § 315). While referral is not mandated, professional interdisciplinary advice should aide parents and school administrators in this sensitive and significant decision. Since the school committee in Burlington has placed the ultimate decision to retain a child with parents, they should be able to draw upon the recommendations of specialists — especially in a case when a child is already receiving special education services.

3. Both Chapter 766 and P.L. 94-142 contain extensive evaluation and procedural requirements which must be employed prior to and at the time an educational plan is written for a student. The record shows that in May 1977 Burlington notified the parents of their recommendation to retain Michael in grade one referencing an "educational plan." No evaluations pursuant to Ch. 766 had been done. Since later records do not include similar correspondence, I assume this practice has been discontinued. Parties concur that this practice does not conform to law and regulation.

4. Regulations require that an evaluation team issue an educational plan or a finding of no special needs at the conclusion of an evaluation. Parties agree this did not occur in June, 1977. I note however that the parents were sent copies of assessment reports, suggestions that a private reading tutor contact a teacher. The parents were also requested to contact the school about Michael's grade enrollment and subsequently did so.

5. I find the school committee did not conform to Chapter 766 sections 311 and 312 in June 1979, through failure to hold a meeting when all persons responsible for assessments met to discuss the results and draft an educational plan. I do note

extenuating circumstances in that assessment results were shared with the parents in several smaller meetings. The intent of the regulations is to assure educational decisions are based on a view of a *whole* child resultant from discussion questions, and ideas of a multidisciplinary team. This interaction is important to the consensus model envisioned by state and federal regulations and becomes critical when a decision to place a child in a restrictive, substantially separate program is possible. One can only speculate on whether the recommendations in the 1979-1980 would differ. It is clear that the parents had sufficient opportunity to discuss evaluations with individual specialists, however. My review of the educational plan shows incorporation of preceding teachers' reports and specialists' evaluations contrary to the parents position that the plan was dominated by Mr. Kavanaugh's findings. Ms. Arin's testimony confirms a plan was not physically written at a Team meeting; however Ms. Arin testified that general objectives were discussed.

6. Regulation § 320.1 also requires a full evaluation prior to a restrictive placement. I find technical violation of this regulation. Evidence show that new medical and home assessments were not conducted prior to June 4, 1979. However, Ms. Arin and the parents had agreed to further evaluations at Massachusetts General Hospital. Ms. Arin further testified they were waiting for these results prior to issuing a plan. The parents discussed with MGH staff the types of evaluation to be conducted. As a result, I can only conclude that the parents did not deem new home and physical assessments to be significant.

7. Section 322 of the 766 regulations required certain statements within an IEP. I find the school committee in substantial compliance with this section, although improvements in specificity could be made (a) in naming the reading methods

and materials (b) in placing timelines on objectives (c) in naming evaluating instruments. Further discussion between the school and parents could have easily resolved these difficulties.

8. I find the school committee in violation of section 337.2 pertaining to parents consent for modifications of the IEP for 1978-1979. Both Ms. Black and Ms. Mason testified that during April-June 1978, Ms. Black worked with Michael alone and that a second child was added for a portion of the period from September 1978 - June 1979. I cannot attach a direct causal relationship to the "reallocation of time" and Michael's slow progress based on the evidence. However the IEP specifies "Reading — Individual, 1 hour per day:" Objectives are marked for an individual instructional setting, as well. Applying the "reasonable man" standard, I would construe "individual" to mean that Ms. Black would work with Michael alone for that time. Further, there is ample evidence of Michael's difficulties in working independently and his need for direct supervision to complete tasks.

9. The parents have requested reimbursement for the cost of certain evaluations based on an allegation that the school committee failed to inform them fully of their rights in the evaluation process in 1977. The school committee contends (a) that it did not have adequate notice or opportunity to examine evidence or witnesses on this issue; (b) that the request for reimbursement is irrelevant to the present appeal year.

As to the issue of fairness, the hearing officer offered, on the date of hearing an opportunity to submit rebuttal evidence or arguments within written closing statements. Both parties subsequently requested that I extend deadlines for closing memorandum, which gave an additional three weeks for rebuttal. I concur with the school committee that the parents should have stated this specific issue earlier in the proceeding. Nevertheless, there is considerable support in the record to

find that the school committee was on notice as to procedural issues in current or prior years and that the issue of reimbursement might arise.

As to evidence on the record regarding the nature of claims, both Dr. Lott and Mr. Panico identified the dates of evaluations at MGH, the names of evaluators, the nature of testing. School committee records include copies of reports which correlate exactly to submitted bills, including the physical examination by Dr. Melvyn Levine (S-3, S-15, S-54, S-55).

Turning to the question of appropriateness to this appeal, ordinarily I might decline jurisdiction for issues of prior years based on the lack of timeliness of an appeal. In this matter, I will take jurisdiction. Note that references pertain to Chapter 766 regulations in effect through September, 1978 (yellow book).

A. I have concluded that the parents were not advised orally or in writing by the school committee of their rights in the evaluation process in 1977-1978. Ms. Arin, in response to a question by the hearing officer, prior to the last day of hearing, did not recall any verbal discussion of independent evaluations until May 1979, nor any written transmission of information about parents' rights subsequent to June 1977. The record shows Ms. Arin has responsibility for evaluation coordination in Burlington. The parents produced their original, and incomplete, notice of rights — a copy of which is in evidence (P-5). Based on the above, I must conclude that the parents cannot be held responsible for any delay in requesting appeal and that the matter is legitimately before the Bureau at this time.

B. The school committee is required to provide an examination by a physician as part of a "Full Core Evaluation" (311.0, 311.4). While parents commonly elect to provide such evaluation through private physicians at their own expense, it is the obligation of the school committee to inform parents of the option of evaluation at school expense. There is no evidence

on the record to conflict with the parents' claim that they were not so informed (P-5). Therefore, I find that the evaluation conducted by Dr. Melvyn Levine of Medford Pediatric Associates is the medical component of the core assessment in June, 1977 and is a legitimate expense of the school committee within the initial evaluation.

C. With reference to the neurological evaluation of Dr. Lott in December, 1977 the issue of school committee liability has two facets:

> (a) The school system did not, within its initial evaluation, conduct a neurological examination; thus the criteria of section 327.1 of equivalency is not met, and I do not construe the neurological assessments within the scope of Burlington's fiscal responsibility under that section;
>
> (b) Dr. Lott's testimony and his written reports clearly state that his evaluation of Michael resulted from referral by Dr. Levine, already noted as the medical member of the school team. Ms. Arin's notes (S-7 p.85) show that Mr. P. phoned in December, 1977, at the time of initial contact with Dr. Lott, to inform her of the evaluation, her notes further show Mr. P's expression of concern about headaches and Michael's continued "struggling" with school work. A review of November 16, 1977, teacher reports support the conclusion that Michael was having considerable difficulty with concentration on task and distractibility (S-78, p.197). Based on this, I conclude that the neurological evaluation relate to legitimate educational concerns; that the referral to Dr. Lott was made by a member of the school evaluation team; and that Mr. P.'s notification of Ms. Arin of Dr. Levine's referral is sufficient to fulfill requirements of section 312. I therefore find the school committee responsible for the December, 1977 neurological evaluation.

D. An evaluation including tests of intelligence, achievement, and some perception areas was conducted at the Cortical Function Test Laboratory on January 9, 1978 pursuant to referral from Dr. Lott. A review of the content of Burlington's June, 1977 evaluation shows equivalency to the school's original evaluation, thereby meeting this test of section 327. for independent evaluations and fiscal liability of the school committee.

E. On March 7, 1978, Dr. Lott met with Mr. and Mrs. P. to explain results of these evaluations subsequent to the receipt of written reports. I construe such a meeting to be an integral part of the evaluations and thereby find liability of the school committee here as well.

F. Records pertaining to the March, 1978 convening of the school evaluation team reveal no further evaluations in the period from June, 1977 were conducted by the school system prepatory to the March 1978-March 1979 educational plan; no request to waive assessments is contained in the record. Inspection of the plan itself (S-18) demonstrates strong reliance on the Massachusetts General Hospital Cortical Function Test Laboratory reports and Dr. Lott's recommendations.

In summary, I find the school committee liable for reimbursement of actual, out of pocket expenses incurred by Mr. and Mrs. P. which have not been paid by insurance or other third party payment up to the limits set by the Rate Setting Commission in effect at that time for a physical examination, neurological examination, and educational assessment.

ORDER

1. Burlington Public Schools shall pay for Michael's tuition and transportation to the Carroll School, a 766 approved private day school for 1979-1980.

2. Burlington Public Schools shall reimburse Mr. and Mrs. P. for costs related to the above placement dating from the rejection of the educational plan for 1979-1980, and
3. Burlington Public Schools shall reimburse Mr. and Mrs. P. for costs not paid by insurance for a medical evaluation conducted by Dr. Melvin Levine in June, 1977; neurological evaluations and consultations conducted or arranged by Dr. Ira Lott on December 16, 1977 and March 7, 1978 and for specific language evaluation Tests at Massachusetts General Hospital on January 9, 1978. Burlington may apply fee schedules of the Rate Setting Commission.

RECONSIDERATION OF DECISION:

Reconsideration of the case may be granted upon the showing of any serious error of law; misconstruction of Chapter 71B or the rules, regulations and policies of the Department of Education; or upon the discovery of material evidence existing at the time of the hearing, but not introduced, which, if proven, would be likely to alter the conclusion of the decision. Written application for reconsideration of such cases may be made by either party to the hearing officer who heard the case and in consultation with the Director of the Bureau of Special Education Appeals, such application may be granted or denied within the discretion of the Bureau. Application should be made within a reasonable time after the decision.

EFFECT OF DECISION AND RIGHTS OF APPEAL:

Both parties have rights of appeal under P.L. 94-142 (20 U.S.C. 1401), Chapter 71B and 30A of the Massachusetts General Laws. The parents may choose to appeal the decision

of the Bureau by so indicating on the form accompanying this decision, thereby constituting an appeal to the State Advisory Commission. The public school system, and the parents after the State Advisory Commission's final decision, may file a petition for review in the Superior Court or in the Federal District Court of competent jurisdiction within thirty (30) days after receipt of the final decision. The State Advisory Commission and the Court have review authority in that they will not hear new evidence in any form. They review the decision to determine if it is reasonable based on the facts and consistent with established policy and law. Where the parents of the child accept the decision of the Bureau of Special Education Appeals or the State Advisory Commission the decision is final and must be implemented immediately. Where the parents of the child reject the decision of the Bureau of Special Education Appeals or the State Advisory Commission the filing of a petition shall operate as a stay of enforcement of said decision. During the pendency of any judicial proceedings, unless the parents agree otherwise, the child shall remain in the educational placement implemented at the time the initial appeal was taken.

RECORD OF THE HEARING:

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party upon request and upon receipt of payment for the recording tapes. Massachusetts General Laws c. 30A sections 11(6) and 14(4) set forth the requirements for making available to a party or a court an official record of the proceedings.

> 30A § 11(6) Agencies shall make available an official record, which shall include testimony and exhibits, and

> which may be in narrative form, but the agency need not arrange to transcribe shorthand notes or sound recordings unless requested by a party. If so requested, the agency may, unless otherwise provided by any law, require the party to pay the reasonable costs of the transcript before the agency makes the transcript available to the party.
>
> 30A § 14(4). Within forty days after service of a copy of the petition for review upon the agency, or within such further time as the court may allow, the agency shall file in the court the original or a certified copy of the record of the proceedings under review. The record shall consist of (a) the entire proceedings, or (b) such portions thereof as the agency and the parties may stipulate, or (c) a statement of the case agreed to by the agency and the parties. The expense of preparing the record may be assessed as part of the costs in the case, and the court may, regardless of the outcome of the case, assess any one unreasonably refusing to stipulate to limit the record, for the additional expenses of preparation caused by such refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

Thus, if either party requests of the Bureau of Special Education Appeals a certified written transcription of the entire sound recordings, or a portion thereof, that party must arrange for the transcription of the sound recordings at their own expense. Transcripts prepared by the party must be submitted to the Bureau of Special Education appeals for certification within 35 days of service of a copy of a petition for review upon the agency.

Any party unduly burdened by the cost of preparation of a written transcript of the sound recordings may petition the Bureau of Special Education Appeals for relief.

COMPLIANCE:

If either party believes that this decision is not being complied with, he/she should request in writing a compliance hearing. Said request should be as specific as possible and should be addressed to the Director of the Bureau of Special Education Appeals.

CONFIDENTIALITY:

In order to preserve the confidentiality of the child involved in these proceedings when an appeal is taken to Superior Court, or Federal District Court, the Bureau of Special Education Appeals strongly urges the appealing party to file the complaint without mentioning the true name of the parents or the child (i.e., use John or Jane Doe), and to move that all exhibits including the transcript of the hearing before the Bureau of Special Education Appeals be impounded by the court. If the appealing party (when it is the School Committee) does not seek to impound documents, the Department of Education through the Attorney General's Office shall move to impound the documents.

/s/_____
HEARING OFFICER January 31, 1980

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 80-359-Z

TOWN OF BURLINGTON and the
SCHOOL COMMITTEE FOR THE
TOWN OF BURLINGTON

vs.

THE DEPARTMENT OF EDUCATION OF THE
COMMONWEALTH OF MASSACHUSETTS and
JOHN DOE, as he is father and next
friend of JOHN DOE, JR.

MEMORANDUM OF DECISION

ZOBEL, D.J.

This is an action by the Town of Burlington, Massachusetts ("the Town") against the Department of Education ("the Department") and against John Doe as he is the father of John Doe, Jr., (both pseudonyms) seeking review under Federal and State law of a decision of the Department under G.L. c. 71B § 3 and c. 30A as to the appropriate educational program of John Junior, a nine-year old boy with learning disabilities. The decision, which was reached after a lengthy hearing, ordered the Town to pay for John Junior's tuition and transportation at the Carroll School, a private day school in Lincoln, for the school year 1979-1980, and to reimburse Mr. and Mrs. Doe for costs related to the placement, including the costs of medical and neurological evaluations performed by private specialists in 1977 and 1978. Plaintiff sues under Federal law 20 U.S.C. § 1415(e)(2) and under the State statute Mass. G.L. c. 30A § 14.

The case is before me on cross motions for summary judgment on Count II of the Complaint, the State law count, Count II is properly in this Court under pendent jurisdiction, as it arises out of the same facts which form the basis for the Federal claim under 20 U.S.C. § 1415(e)(2). *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966).*

The scope of review under G.L. c. 30A § 14 is limited; this Court does not act as an independent fact-finder. Instead, it will remand, reverse or modify the decision of the Department only if the substantive rights of any party may have been prejudiced because the agency decision is, for example, in violation of constitutional provisions, in excess of statutory authority, based on an error of law or on unlawful procedure, unsupported by substantial evidence, or arbitrary or capricious. After a careful review of the law and of those portions of the record adverted to by the parties, I find that defendants are entitled to judgment on Count II as a matter of law.

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* Defendants Doe assert that a municipal corporation lacks standing under Federal law, 20 U.S.C. § 1415 to bring an action in Federal Court, that therefore this Court has no subject matter jurisdiction over Count I and consequently can have no pendent jurisdiction over Count II. The argument is without merit. It ignores the explicit and unambiguous language of the statute, 20 U.S.C. § 1415(e)(2) which grants the right of appeal to a U.S. District Court to . . . "*any party* aggrieved by the findings and decision" of the State administrative agency (emphasis added), expressing a clear congressional intent to make the Federal forum available to either party. Defendants' reliance on *Dartmouth College* v. *Woodward*, 4 Wheat. 518 (17 U.S.), and the cases following its doctrine, is also misplaced. The doctrine that a political subdivision of a state may not challenge the Constitutionality of a State statute or rule is not applicable where, as here, the challenge is not to the Constitutional validity where, as here, the challenge is not to the Constitutional validity of any law or rule but to the correctness of a hearing officer's application of the law to a particular set of facts. Moreover, the parties in this action clearly manifest sufficiently adversarial positions to assure the court that all issues will be fully presented, a concern of the doctrine which prevents subdivisions of the State from suing the State itself or its administrative agencies, on the ground that both are essentially the same entity and therefore not adversaries, *Rogers* v. *Brockette*, 588 F.2d 1057 (5th Cir. 1979).

Plaintiffs mount multiple attacks on the decision of the hearing examiner, but their arguments can be reduced to three basic charges: first, that there is no substantial evidence in the record to support the examiner's rejection of Mr. John McAleer's classroom as an appropriate educational environment for John, Jr.; second, that the decision of the hearing examiner is tainted and invalidated by her explicit reliance on the irrelevant issue of plaintiff's past violations of the Does' procedural rights, and, moreover, that plaintiffs were not given notice that this issue would be considered by the examiner; third, that the Carroll School is not the least restrictive placement which is adequate to meet John's needs. I consider each argument in turn.

The hearing officer's central finding was that the Town's assignment of John, Jr. to Mr. John McAleer's Special Needs classroom was inappropriate because of Mr. McAleer's limited experience in working specifically with learning disabled children, because he used a different reading method than the one John, Jr. had been tutored with for the previous year and a half, and because the class would not provide John, Jr. with a peer group of children with similar reading needs and with whom similar teaching methods would be employed. (BSEA #2867 p.8). The hearing officer agreed that "all evidence supports a view that Mr. McAleer is an excellent teacher." (BSEA #2867 p.8). Her finding that Mr. McAleer's classroom was nevertheless an inappropriate placement for John, Jr. reflects no criticism of Mr. McAleer's skill or achievement. Instead, the hearing officer correctly relied on testimony and reports which attested to the severity of John, Jr.'s perceptual difficulties, requiring placement with a teacher who specialized in similar disabilities, to his need for "a highly specialized setting for children with learning handicaps," (letter, Dr. Lott to Mr. Doe, 7/10/79 R-p.30), to professional recommendations that he continue with the Orton-Gillingham reading method

and that continuity of method is important. The hearing officer found that Mr. McAleer's experience, although it included excellent work with students manifesting a wide range of emotional and other disabilities, was not sufficiently specialized in the particular methods and skills which John, Jr. required. This finding does not mean, as plaintiffs assert in their brief (p.11) that it will now be virtually impossible for teachers who have not already taught dyslexic children to do so in the future. The finding is limited to the facts of this case, which support a conclusion that John, Jr.'s special problems, in conjunction with the method of reading instruction which had been used with him in the past by Ms. Black, necessitated a placement with an instructor trained in the Orton-Gillingham method and experienced in dealing with children similarly disabled.

Further, the hearing officer properly took into account the testimony of Dr. Lott and Ms. Black which indicated that John, Jr. would learn best in an environment which could provide a peer group of children with similar disabilities so that small group work could be the dominant mode of instruction, so that John, Jr. would not be frequently distracted, and so that he would not be the weakest student in the class.

While there was testimony by Mr. McAleer among others, indicating that John, Jr. could be successful in Mr. McAleer's class, there was also testimony that the composition of the class group, the reading and teaching methods used there and the lack of specialized training in John, Jr.'s particular disability rendered Mr. McAleer's classroom inadequate to meet John, Jr.'s special needs. The hearing officer was entitled to review the evidence on both sides and to reach her own decision. The fact that this court might have decided the facts differently does not invalidate the hearing officer's decision where, as here, it was supported by substantial evidence, *Labor Relations Commission* v. *University Hospital, Inc.*, 359 Mass. 516 (1971). The administrative agency, as fact finder, is the

sole judge of the weight and credibility to be accorded to the evidence before it. *Maddocks* v. *Contributory Retirement Appeal Board,* 369 Mass. 488, 495 (1976).

Plaintiff's second complaint is that the hearing officer's decision improperly rested on a finding of various procedural irregularities committed by the Town in dealing with the Does. While plaintiffs are correct that it was improper for the hearing officer to rely on past behavior which was irrelevant to the Town's capability of implementing the Individual Educational Plan ("IEP") in the future, *Cohen* v. *Bd. of Registration of Pharmacy,* 350 Mass. 246 (1966), I find that the decision nevertheless rests on grounds which are independently adequate. The hearing officer indicated that her decision rested both on "doubts that Mr. McAleer's classroom is an appropriate placement" and on the finding that the Town lacked the "capacity to comply with educational and procedural mandates" on John, Jr.'s behalf. (BSEA #2867 p.7). As discussed above, the hearing officer's findings as to the educational appropriateness of Mr. McAleer's classroom are supported by substantial evidence. In addition, several of the "procedural" irregularities, such as the impermissibly broad range of students in Mr. McAleer's class, (BSEA #2867 p.9) might well affect the educational environment and thus the appropriateness of the placement. It was open to the hearing officer to determine that expert recommendations that John, Jr. needed to be among small groups of peers with similar disabilities precluded a placement in a class of seven children whose ages covered a four-year span. Accordingly, although the hearing officer's decision is inartful and contains irrelevant matters, these matters are not central to her decision so as to taint and invalidate it. Her lengthy catalogue (BSEA #2867 pp.9-11) of instances of failure to comply with State law and regulations in dealing with the Does is not necessary to support her finding. This being so, the further issue of lack of notice to the plaintiffs

that procedural irregularities would be considered becomes moot.

Third, the hearing officer's finding that the Carroll School is the least restrictive adequate alternative must be upheld on the record. Once the placement in Mr. McAleer's classroom had been found to be inadequate to meet John, Jr.'s needs for an intensive specialized small group setting, and further, because no other potential placements were specifically proposed or discussed, the Carroll School was in fact the least restrictive available placement which was adequate to meet all of John, Jr.'s particular academic needs. While it is true that a specialized private school appears to be a restricted environment in comparison to a public school which offers at least the possibility of mainstreaming certain academic subjects, it must be remembered that the overriding concern of the hearing officer is to determine which placements will meet all of the child's special needs and then to choose the least restrictive among otherwise adequate alternatives. In this case the Carroll School was the only appropriate choice.

Finally, the hearing officer's order that the Town pay the costs of medical and neurological assessments performed in 1977 by Dr. Melvyn Levine and Dr. Ira Lott (BSEA #2867 p.12) must also be upheld. The hearing officer heard uncontradicted testimony that the Does had not received notice from the Town of their right to have such assessments performed at school expense. The Town's contention that it received no notice that this issue would be considered is without merit. The hearing officer had discretion to consider all issues relating to John, Jr.'s evaluations and placement, the Town brought its records and participated in lengthy hearings, and briefed this issue after the hearing.

Accordingly, defendants' motion for summary judgment on Count II is allowed; plaintiff's motion for summary judgment on Count II is denied. There being no just reason for delay, judgment for defendant shall be entered pursuant to F.R.C.P. 54(b).

November 19, 1980
Date

/s/ _____
Rya W. Zobel
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 80-359-Z

TOWN OF BURLINGTON and the
SCHOOL COMMITTEE FOR THE
TOWN OF BURLINGTON

vs.

THE DEPARTMENT OF EDUCATION OF THE
COMMONWEALTH OF MASSACHUSETTS and
JOHN DOE, as he is father and next
friend of JOHN DOE, JR.

JUDGMENT

ZOBEL, D.J.

In accordance with the Memorandum of Decision, it is

ORDERED that judgment be and it is hereby entered for the defendants on Count II.

November 19, 1980
Date

/s/_____
Rya W. Zobel
District Judge

TOWN OF BURLINGTON and the School Committee of the Town of Burlington, Plaintiffs, Appellants,

v.

The DEPARTMENT OF EDUCATION OF the COMMONWEALTH OF MASSACHUSETTS and John Doe, as He is the Father and Next Friend of John Doe, Jr., Defendants, Appellees.

Nos. 80-1527, 81-1112.

United States Court of Appeals,
First Circuit.

June 18, 1981.

David Berman and John F. Zamparelli, Medford, Mass., Town Counsel for plaintiffs, appellants.

Michael Broad, Asst. Atty. Gen., Boston, Mass., with whom Francis X. Bellotti, Atty. Gen., Boston, Mass., was on brief for appellee, Dept. of Ed. of the Commonwealth of Massachusetts.

Gerald B. Gallagher, Acton, Mass., for defendants, appellees John Doe, etc.

Before COFFIN, Chief Judge, BOWNES, Circuit Judge, WYZANSKI, Senior District Judge.*

COFFIN, Chief Judge.

The ultimate question to be decided in this case is whether the Town of Burlington, Massachusetts must pay for the special education of John Doe, Jr. The district court held that the

* Of the District of Massachusetts, sitting by designation.

Massachusetts Department of Education's decision that the Town must reimburse Doe, Jr.'s father was supported by substantial evidence as a matter of state law. It also denied the Town's motion for stay of the Department's decision and granted Mr. Doe's and the Department's motions that the Department's decision be enforced during the pendency of the action. The Town appeals all three judgments. We vacate the first and third judgments and affirm the second judgment.

I

The parties to this suit agree that John Doe, Jr. has special educational needs justifying some type of publicly financed service. *See generally* 20 U.S.C. §§ 1401-20 (providing federal aid for education of handicapped); Mass.Gen.Laws Ann. ch. 71B (West Supp.1981) (providing for education of children with special needs). The Town proposed that he attend the special education program at the Pine Glen School, a public school that provides both regular elementary and special educational curricula. Mr. Doe preferred the private Carroll School. As state law provides, Mr. Doe sought review of the Town's decision by the state Department of Education. *See id.* at §§ 3 & 10; 603 C.M.R. § 401.0 (Code of Massachusetts Regulations). *See also* 20 U.S.C. § 1415(b)(2) & (c). The Department held hearings on this matter from September to November 1979. At the beginning of his child's fourth grade year in September 1979, Mr. Doe enrolled his son in the Carroll School. In January 1980, the Department ruled that the Carroll School was the appropriate program and ordered the Town to pay for the child's education there. In its decision the Department advised that the Town could "file a petition for review in the Superior Court or the Federal District Court." *Cf. Ezratty v. Commonwealth of Puerto Rico,* 648 F.2d 770, at 776 (1981) (no express consent by Puerto Rico to suit in federal court).

The Town then sought judicial review of the Department's decision. It filed suit against the Department and Mr. Doe in

federal district court on a two count complaint. Jurisdiction for the first court ["the federal count"] was founded upon 20 U.S.C. § 1415(e)(2), which provides for judicial review for "[a]ny party aggrieved by the findings and decision made" pursuant to state procedures required of state and local agencies receiving federal assistance by the federal aid-to-the-handicapped scheme.[1] *See id.* at § 1415(a), (c) & (e). The second count ["the state count"] claimed to be a pendent matter under

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[1] "§ 1415. Procedural safeguards

(a) Any State education agency [and] any local educational agency . . . *which receives assistance under this part* . . . shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that *handicapped children and their parents or guardians* are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b)(1) The procedures required by this section shall include, but shall not be limited to — . . .

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by . . . the local education agency. . . .

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency . . ., any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review. . . .

(e)(1) . . . A decision made under subsection (c) *shall be final, except* that any party may bring an action under paragraph (2) of this subsection.

(2) . . . [A]ny party aggrieved by the findings and decision under subsection (c) . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In *any* action brought under this paragraph the court shall receive the records of the administrative proceedings, *shall hear additional evidence*

a Massachusetts law establishing judicial review for "any person . . . aggrieved by a final decision of any agency. . . ." Mass.Gen.Laws Ann. ch. 30A, § 14 (West 1979).[2]

The Town moved on May 26, 1980 for a stay of the Department's order that the Town pay for the Carroll School education. It sought only to avoid payment to the Carroll School and to Mr. Doe at that time; it did not seek and has not sought to have John Doe, Jr. transferred from his ongoing education at the Carroll School. In connection with this motion, the Town requested an evidentiary hearing. After hearing oral argument on July 7, 1980, but without taking evidence, the district court denied the requested stay on July 24, 1980. The Town appealed to us from that decision.

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at the request of a party, and, basing its decision on the *preponderance of the evidence,* shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . ." (Emphasis added.)

Since § 1415(a) applies only to state and local educational units that "receive[ ] assistance under this subchapter", we understand the receipt of such assistance to be a jurisdictional prerequisite to review under § 1415(e)(2), and, therefore, a matter to be pleaded in the complaint. *See* Fed.R.Civ.Proc. 8(a). The Town's original complaint satisfied this requirement only indirectly — by appending and incorporating the Department's decision, which indicates that the federal statute, P.L. 94-142, and its accompanying regulations apply in this case. *See* 45 C.F.R. § 121a.2 (1979) ("Applicability [of regulations] to State, local, and private agencies"). The fact of federal funding is confirmed by the subsequently filed papers in No. 81-1112. They show that the Town has amended its complaint to add a count reciting that a Department official "held a hearing on whether to freeze federal funds for aid to the handicapped to Plaintiff under Title 20 U.S.C. § 1414(b)(2)(A)."

A more direct statement of jurisdiction from the outset would have been preferable.

[2] This count also asserted jurisdiction based on "the provisions of Title 42 U.S.C. § 1983 and Title 28 U.S.C. § 1343 and Title 20 U.S.C. § 1331. . . ."

The parties filed cross motions for summary judgment on the state count, which the district court decided in favor of the defendants on November 19, 1980. The district court certified this judgment as final under Fed.R.Civ.Proc. 54(b), and set the federal count for future trial. The Town appealed from the summary judgment decision. We consolidated this appeal with that already pending from the district court's July 24 decision to constitute No. 80-1527.

We heard oral argument in No. 80-1527 on March 4, 1981. Meanwhile, the posture of the case had continued to change. The Department moved for a preliminary injunction on December 11, 1980 to enforce its order requiring the Town to pay tuition and to reimburse the Does. This motion supplemented Mr. Doe's pending motions to similar effect. On December 15, 1980, the Massachusetts Commissioner of Education wrote to the Town threatening to freeze *all* of its special education assistance unless the Town complied with the Department's order. After a hearing on this matter, a state hearing officer concluded on January 30, 1981 that the Department properly could withhold fiscal year 1981 funds from the Town. On February 9, 1981, the district court held a hearing at which the Town stated that it was now "prepared to keep this child in school until this case can be decided." The Town also made clear that it would also pay for the child's school transportation "from here on in . . . without any problem to Mr. Doe." We were informed at oral argument that the Town has made good on these commitments.

The Town persisted, however, in refusing to reimburse Mr. Doe for his *past* expenses for the 1979-1980 academic year. On February 12, 1981, the district court issued an order requiring the Town, *inter alia,* to reimburse Mr. Doe in the amount of $8837.97 for past educational expenses. The Town appealed

this order, which we docketed as No. 81-1112 and in which we heard oral argument on June 3, 1981.[3]

We therefore have before us in No. 80-1527(1) an appeal from the district court's November 19, 1980 grant of summary judgment for the Department and Mr. Doe on Count II of the Town's complaint, and (2) an appeal from the district court's July 24, 1980 denial of the Town's motion for stay of the Department's order pending final resolution of the case. In No. 81-1112 we are presented with the Town's appeal from the district court's February 12, 1981 order of 1979-1980 reimbursement. We consider these issues in that order.

II

[1] We hold that the district court erred in granting summary judgment for the defendants under state law because we conclude that state law cannot be applied when review under federal law is sought. By its terms 20 U.S.C. § 1415(e)(1) provide that decisions by the state educational agency "shall be final, except that any party" has judicial appeal rights under 20 U.S.C. § 1415(e)(2). That subsection provides for review *in state or federal court*. It also sets forth the procedure and standards for this review: "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *Id.*

This federal specification for review, when invoked, seems to us designed to occupy the field over an inconsistent state pro-

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[3] The Town moved that this order be stayed pending our decision. Since we rule on the merits of this issue in part IV of this opinion, the question of stay is now moot.

vision.[4] Here the arguably applicable state review provision — part of the state's general administrative procedure legislation — calls for, *inter alia*, judicial review governed by the substantial evidence standard. Mass.Gen.Laws Ann. ch. 30A, § 14. This standard does conflict with the federal standard; we can imagine many judicial reviews that would uphold an agency decision as based on substantial evidence but that would reach a different result were new evidence to be taken and judged under the more rigorous "preponderance of the evidence" standard.

This conflict could lead to results that should be avoided. For instance, the Department might have ruled in this suit that the Town's proposed plan was faulty but that appropriate relief was something other than what Mr. Doe sought. One aggrieved party might have selected a state forum for review under state law while the other filed in federal court claiming review under the federal standard. If both review provisions legitimately coexisted, the resolution of the controversy could inspire an unseemly race to judgment. Even this would not dependably produce consistency. A decision based simply on substantial evidence would not be res judicata for an issue to be decided by the more probing preponderance of the evidence standard. The converse situation would often be more settled, since a finding under the preponderance standard would generally control the substantial evidence question. But inconsistencies could appear here as well. The federal provision directs that the reviewing court "shall hear additional evidence at the re-

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[4] We need not decide whether the federal review provision would have preemptive force when the only aggrieved party seeks relief *solely* under state law since here the Town *has* invoked 20 U.S.C. § 1415. It is possible that an aggrieved party might for financial or other reasons be satisfied with the more limited judicial review available under state law; conceivably the federal policy embodied in § 1415 would not be infringed when willingly waived by its beneficiary.

quest of a party", while the state provision normally confines its review to the record developed by the agency. *See* Mass.Gen.Laws Ann. ch. 30A, § 14(6) (West 1979). A preponderance-of-the-evidence holding based on an expanded record could present a different legal issue than that faced on a substantial evidence review of a limited record, thus again presenting the specter of inconsistent federal and state judgments, one which might attempt to affirm and enforce the Department's ruling while the other sought to overturn it.

We therefore vacate the district court's decision concerning state law that does not apply in this case.[5] This will leave the scheduled trial on the federal count as the sole mechanism of judicial review in this case.

III

[2] The Town appropriately styled its motion that the district court stay the Department's enforcement of its order as a request for a preliminary injunction. Therefore, the Town "faces a heavy burden in attempting to convince us to upset the judgment of the district court in this matter." *Manning v. Trustees of Tufts College*, 613 F.2d 1200, 1202 (1st Cir. 1980). We resolve the question on the narrow ground that the Town has not shown a danger of immediate irreparable injury. *See Automatic Radio Mfg. Co. v. Ford Motor Co.*, 390 F.2d 113, 116 (1st Cir. 1968).

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[5] Mr. Doe urges that the Town should not be allowed to invoke 20 U.S.C. § 1415(e)(2) as "an[ ] aggrieved party" since an earlier section, *id.* at § 1415(a), refers only to "handicapped children and their parents and guardians. . . ." The district court rejected this narrow construction of § 1415(e)(2)'s "any party aggrieved" language as ignoring "the explicit and unambiguous language of the statute. . . ." We affirm this reasoning. We also note that to confine a town to review under state law could lead to one-sided results if the town's opponents could race to a federal review that is preemptive or otherwise normally controlling as res judicata by virtue of its more scrutinizing character.

The Town's only asserted injury is the payment of money it fears will not be returned should it prevail in this suit. This sum is the Town's share of the added cost of the private Carroll School over the public Pine Glen School,[6] which the Town claimed was at least $3691 a year.[7] Apparently assuming that the litigation would last two years, the Town thus argued that it faced an irreparable injury of $7400.

Normally the fact of a relatively small and precisely quantifiable injury is sound evidence that preliminary equitable relief is not warranted since just such injuries can be remedied adequately by final judgment. In this case the Town attempted to escape this general guide by pointing to Mr. Doe's statement, appended to his "Motion to Require Plaintiffs to Honor Decision of the Department of Education of the Commonwealth", that he would "not have the full liquidity needed to litigate this case against a governmental body with comparatively unlimited financial assets."[8] The Town commented that it was "hardly necessary to read between the lines; if the town pays out the money to pay for John's education at the Carroll School,

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[6] The Town asserts that the net marginal cost of withdrawing John Doe, Jr. from the regular public program and enrolling him in the special public program at Pine Glen is negligible.

[7] According to the Town, the Carroll School costs a total of $6486 a year, of which the state will reimburse to a maximum of $2795. The Town stated that this maximum reimbursement is "rarely if ever reached" but did not disclose the extent of the typical shortfall. Since the burden of establishing irreparable injury rests with the party seeking the injunction, from this lack of allegation we presume that the shortfall typically is not significant.

[8] Mr. Doe also stated that he "took the financial risk" of transferring Doe, Jr. to the Carroll School. We think this mention of risk refers to the fact Mr. Doe's ultimate success in, and hence right to reimbursement from, the Department's appeal process was uncertain. *See Amherst-Pelham Regional School Comm. v. Dep't of Educ.*, 376 Mass. 480, 493, 381 N.E.2d 922, 931 (1978) (parents "assumed a financial risk that the bureau would recommend a different [educational] placement" for their child).

its chances of ever seeing that money back if it prevails on either or both counts of the present action are slim."

We do not think that Mr. Doe's statement — the sole contemporaneous substantiation that the Town offered for a threat of immediate irreparable injury — was sufficient to discharge the Town's burden in requesting an injunction here. We take Mr. Doe's lament regarding "liquidity" in its ordinary sense, as referring to a condition in which assets are not liquid, but are not necessarily wanting. The reference to litigation "against a governmental body with comparatively unlimited financial assets" we understand to imply either that the Does expected that their ability to match the Town's conduct of this litigation would be hindered by their own more pressing resource constraints, or that they would be forced to make undue sacrifices (such as liquidating major capital assets, like their home) to keep pace with the Town. Neither of these possibilities would necessarily hamper the Town's ability, in the event of its ultimate victory, to collect a $7400 judgment against an individual that the record shows to be employed by the federal government as a professional in a supervisory position. A cynical observer might remark that these impediments to the Does' capacity to finance spirited litigation could even *increase* the chances of the Town's final recovery. We therefore cannot say that the district court abused its discretion in denying the Town's request for preliminary injunction.

[3] The Town also complains that the district court ruled without holding an evidentiary hearing. We observe that the Town exercised its ample opportunity to brief its position, and again presented its arguments in a substantial oral hearing before the district court. The sole asserted basis for the threat of irreparable injury in each instance was Mr. Doe's statement. Although the Town made clear its desire to provide evidence on its probability of success on the merits, at no time did it submit affidavits or make offers of proof on the matter of ir-

reparable injury. Under these circumstances the district court could fairly conclude that further hearings to take evidence were unnecessary to decide the motion before it.

IV

[4] We now come to the February 12, 1981 order that the Town reimburse the Does for their 1979-1980 expenses according to the Department's decision "pending a final determination on the merits". The district court explained that this payment was required since 20 U.S.C. § 1415(e)(3) ("the child shall remain in the then current educational placement of such child" during review proceedings) had "been held in this case to require that John, Jr. be maintained at the Carroll School during the pendency of this litigation. Judgment and Memorandum of Decision November 19, 1980."[9]

We think the district court misinterpreted the intent of 20 U.S.C. § 1415(e)(3). As we read this section, it provides only that children shall remain "in the then current educational *placement*" (emphasis added) during placement disputes. Here no one proposed to change Doe Jr.'s placement at the Carroll School; rather the dispute was over who should bear a portion of the expenses of that placement until final judgment could be rendered. We therefore think that the district court should have handled the petition for reimbursement of the Does as a petition for preliminary injunction and applied the traditional criteria. Had it done so, we believe that neither the Department nor Mr. Doe could be found to have made a showing of irreparable harm after the Town undertook on February 9 to pay all but the Does' first year expenses. Mr. Doe had displayed

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[9] Because the district court made no reference to the Does' pending motion that the Town be placed in contempt, we assume that the court intended to take no action on this motion in its February 12 order.

his ability to pay these sums. The record before us contains no demonstration of impending injury that final judgment, should it be in his favor, would be unable to redress.

If by its reference to its decision of November 19, 1980 the district court meant to make a finding that the Does and the Department had a likelihood of success on the merits, we think that this also was error. We have vacated this November 19 judgment in part II of this opinion. Moreover, that judgment purported only to consider state law and thus had not determined what the different federal provisions might dictate in this case. Any finding on the likelihood of success would have required a hearing on the evidence that the parties proposed to introduce in the § 1415(e)(2) review.

Our result in this case might be thought anomalous because we have affirmed a refusal to stay the Department's order but have reversed an order to enforce it. Any anomaly is superficial. The refusal to apply interim judicial powers of equity on either side leaves the field open to extrajudicial resolution. Here that resolution has produced an apparently fair division of the burdens of delay, in that neither side to date has shown the threat of irreparable injury that provides the rationale for interim relief. *See* Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv.L.Rev. 525, 540-48 (1978). If on remand further questions as to preliminary relief arise, we are confident that the district court will expedite trial on the federal count so that the underlying merits of this suit may be clarified. *See* Fed.R.Civ.Proc. 65(a)(2). *See also id.* 65(c) (requiring appropriate security be posted should preliminary injunction issue).

The district court's grant of summary judgment is vacated, as is its order of February 12, 1981. Its denial of preliminary injunction is affirmed. The case is remanded with instructions that the second count of the Town's complaint be dismissed and that trial proceed on the first count. No costs.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 80-359-Z

TOWN OF BURLINGTON, ET AL.,

VS.

DEPARTMENT OF EDUCATION, ET AL.

PRETRIAL ORDER

ZOBEL, D.J.

Pleadings and Parties

This is an action under The Education for all Handicapped Children Act of 1975 ("the Act"), 20 U.S.C. § 1401-20, to review the decision of the Department of Education of the Commonwealth of Massachusetts ("the Department").

Plaintiffs, the Town of Burlington and the School Committee of the Town of Burlington ("the Town"), seek review of the determination of the state Bureau of Special Education Appeals ("BSEA") that the appropriate placement of John Doe, Jr. for the school years 1979-80 was at the Carroll School, Lexington, Massachusetts. Named as defendants are John Doe, Sr., as father and next friend of John Doe, Jr., and the Department. Defendant Doe has filed a counterclaim for damages against the Town, several school administrators and members of the school committee. All defendants in counterclaim have moved to dismiss. The Town has also moved for summary judgment with respect to the complaint on the ground that Doe is barred from tuition reimbursement for having changed his son's place-

ment while proceedings were pending. Failing that, the Town seeks summary judgment on the grounds that a) this court's jurisdiction is limited to the 1979-80 school year and b) that defendant Doe's failure to make his son available for evaluation subsequent to the 1979-80 school year bars recovery.

Certain other procedural issues were raised at a pretrial conference held on November 2, 1981.

Order

1. The motions to dismiss the Doe's counterclaim are allowed.

2. The Town's motion for summary judgment is denied.

3. The Court has jurisdiction to grant relief for years after 1979-80.

4. The Court will admit the transcript of the administrative hearing and any additional relevant evidence offered by any party.

Since the Court has jurisdiction to grant relief for years after 1979-80, evidence as to such later years is relevant. However, neither hypothetical evidence as to the progress John Doe would have made in the public school, nor evidence of the parents' conduct is admissible.

5. The issues to be tried and determined are:

a) What was the "appropriate" placement for John Doe during the school year 1979-80.

A resolution of this issue will depend on evidence concerning i) the nature of John Doe's learning disability and special education needs, and ii) the Town's proposed individual educational plan.

b) What is the "appropriate" relief to be granted for subsequent years.

A resolution of this issue will depend on evidence concerning i) John Doe's educational needs during 1980-81 and 1981-82, and ii) available facilities and programs to satisfy his needs.

c) Should the Town pay costs related to John's placement in 1979-80, including medical evaluations performed by specialists in 1977 and 1978. There being no factual disputes with respect to this issue, the parties will stipulate to the amount and the court will determine on the basis of the law where the obligation properly lies.

6. The Town has the burden of proving by a preponderance of the evidence that the plan it formulated for John Doe, Jr. for the year 1979-80 was appropriate for him (Issue (a)).

The defendants Doe have the burden of proving the appropriateness of the relief they seek for years after 1979-80 (Issue (b)).

7. The case will be tried to the Court without a jury. Because I will hear additional evidence requested by the parties, counsel are requested to submit further pretrial memoranda listing their witnesses and exhibits, and estimating the trial time.

Discussion

Motion to Dismiss Counterclaim for Damages

Insofar as the counterclaim is based on Title 20, U.S.C. and on claims under 42 U.S.C. § 1983, it is dismissed under the authority of *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981). The "bad faith" exception envisioned by *Anderson* v. *Thompson, supra,* refers to a fact situation different than the one presented by the instant case. In *Anderson*, the court noted that, where a school district acts egregiously by failing to comply with procedural requirements, parents who were

forced to arrange unilaterally for appropriate services may be entitled to money damages for the cost of those services should they ultimately prevail. *Id.* at 1214. Notwithstanding the "bad faith" requirement, on which I do not rule, in the counterclaim Doe, Sr. is not seeking reimbursement for expenses incurred. Therefore, he is not entitled to rely on the bad faith exception articulated in *Anderson, supra*. The pendent state claims are dismissed under the authority of *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Town's Motion for Summary Judgment

In its motion for summary judgment, plaintiff has asserted that because Doe, Sr. placed his child in the private Carroll School in September 1979, rather than retain him in the Pine Glen School recommended by the Town, 20 U.S.C. § 1415(e)(3) bars him from reimbursement. Section 1415(e)(3) provides:

> (3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . .

The section is intended to ensure the maintenance of the status quo during the course of litigation over the substantive issue of placement. *Monahan* v. *State of Nebraska*, 491 F.Supp. 1074, 1088 (D.Nebr. 1980).

The First Circuit has already implicitly rejected the Town's argument. In this case, *Town of Burlington* v. *Dep't. of Education*, 655 F.2d 428 (1st Cir. 1981) the court distinguished a dispute over tuition reimbursement, as here, from one over a change in physical placement. *Id.* at 433. It interpreted § 1415(e)(3) as applying only to the situation where the actual physical placement of a child was at issue. *Id.* In this case there is

no debate over the child's physical placement. The child has been at the Carroll School since September 1979, and no effort has been made to remove him from that setting. Because the debate centers not on a physical placement, but on the allocation of tuition costs with respect to a settled placement, this Circuit has held that § 1415(e)(3) is not applicable in this case.

The Town nevertheless argues that the decision of the Fourth Circuit in *Stemple* v. *Board of Education of Prince George's County*, 623 F.2d 893 (4th Cir. 1980) *cert. denied*, 101 S.Ct. 1348 (1981) bars a parent who has altered his child's placement during the pendency of the proceedings from litigating the substantive placement issue. In *Stemple*, the court found that the parents' unilateral decision to place their child in private school during the proceedings negated their right to recover the tuition costs they had incurred. It stated that § 1415(e)(3)

> creates a duty on the part of parents who avail themselves of the hearing and review provisions of (§ 1415) to keep their child in his current educational assignment while the hearing and review provisions are pending. . . ., that duty . . . certainly negates any right on the part of parents . . . to elect unilaterally to place their child in private school and recover the tuition costs thus incurred. *Stemple* at 897.

If *Stemple* is read to bar an appeal of the substantive issue of appropriate placement by parents who unilaterally changed their child's placement during the course of the proceedings it contravenes the Act. Section 1414 guarantees a handicapped child a "free and appropriate education" in states which accept federal funding. *Stemple* can only be properly interpreted to mean that a parent who unilaterally moves a child into a private school setting is at risk for tuition costs for that period, should

he ultimately lose the substantive "appropriate" placement issue. Therefore, even were one to ignore the First Circuit's interpretation of § 1415(e)(3) in the context of this case, Doe Sr.'s action in removing his child from the public school in September 1979 does not affect his right to avail himself of the appeal procedure provided by the Act.

Procedural Issues

20 U.S.C. § 1415(e)(2) provides the procedural framework for this case. That section establishes that

> [a]ny party aggrieved by the findings (of the state education agency) shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversey. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

The statute has been interpreted to require that a court's review of the agency hearing shall be by a trial *de novo*. *Monahan, supra*, at 1084; *New York State Ass'n* v. *Carey*, 466 F.Supp. 479, 486 (E.D.N.Y. 1978); *Lora* v. *Board of Education of the City of New York*, 456 F.Supp. 1211, 1227 (E.D.N.Y. 1978). *See also* Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975, 92 Harvard L. Rev. 1103, 1108 n. 35 (1979). However, questions remain as to the weight to be afforded to the agency findings, the allocation of the burden

of proof, admission of evidence in addition to the administrative record, and jurisdiction of the court with respect to subsequent school years as to which state administrative remedies may not have been exhausted.

Resolution of these questions is complicated by an inherent conflict. On the one hand, it is incumbent upon a court to defer to administrative expertise in matters with which the courts have little familiarity. *Ezratty* v. *Commonwealth of Puerto Rico*, 648 F.2d 770, 774 (1st Cir. 1981). On the other hand, Congress has clearly articulated a desire to invest the federal courts with a greater role in the enforcement of appropriate education for the handicapped. *Campbell* v. *Talladega County Board of Education*, 518 F.Supp. 47, 53 n. 9 (N.D.Ala., E.D. 1981).

The statute appears to set up a hybrid form of review. While the Court must make an independent determination, the statute specifically authorizes the court to "receive the records of the administrative proceedings". In light of this mandate, it is appropriate to give the agency decision the *prima facie* effect given to Master's findings. *See generally,* Enforcing the Right to An Appropriate Education, *supra*, at 1108 n.36 (opinions of state hearing officers an important element, yet deference will depend on nature of case); M.S. Krass, The Right to Public Education for Handicapped Children: A Primer for the New Advocate, 1976 U.Ill. L.F. 1016, 1069. Because the statute also requires the court to "hear additional evidence at the request of a party", I am bound to receive additional evidence offered by the parties, provided it is relevant.

In determining the relevance of certain testimony the court is bound by the language of the statute which empowers it to "grant such relief as (it) determines is appropriate". This language has been given a broad interpretation in a recent opinion, *Rowley* v. *Board of Education of Hendrick Hudson Central School District*, 483 F.Supp. 536 (S.D.N.Y.), *aff'd*, 632 F.2d 945 (2nd Cir. 1980), *cert. granted on other grounds*, 50

U.S.L.W. 3334 (U.S. November 2, 1981) (No. 80-1002). In that case the court rejected a motion to dismiss the complaint for lack of jurisdiction on the grounds that plaintiffs had failed to exhaust their administrative remedies for years subsequent to the school year which was being litigated. The court held that since its power to grant any "appropriate" relief included injunctive relief extending beyond the school year at issue, it would hear evidence dealing with subsequent years in addition to the specific school year before it. *See also, Anderson* v. *Thompson*, 495 F.Supp. 1256, 1260-61 (E.D.Wis. 1980) ("little purpose served by freezing the evidence at the moment in time when the final state administrative decision was rendered"); *Norris* v. *Dept. of Ed.*, 80-1527(S)(M) (D.Mass. Oct. 9, 1981).

Although the statute requires that plaintiffs exhaust all administrative remedies before appealing their claims to the District Court, I am persuaded by the well-reasoned opinion in *Rowley*. Because the statute requires the development of an annual Individualized Education Plan (IEP) for each child, the requirement that administrative remedies be exhausted for each school year creates a situation in which a dispute is in danger of continuing indefinitely. Since Congress has vested in the District Courts the responsibility of determining the appropriateness of a handicapped child's education and since they must do so after a trial *de novo*, in the interest of judicial economy and efficiency, I adopt the position taken in *Rowley* and will hear evidence respecting the years subsequent to 1979-80.

However, I do not consider the hypothetical evidence as to the progress John Doe would have made had he been in the Pine Glen School to be relevant either to the school years 1979-80 or to subsequent years. Since such evidence is too speculative to be probative, I will not receive such evidence. Nor do I consider the conduct of the parties with regard to subsequent evaluations to be relevant to the "appropriateness" of an educational placement for John Doe during those years,

and I will receive no evidence on that issue. *See Anderson* v. *Thompson, supra*, at 1264. (Court's function is not to allocate blame among parties for their past inabilities to agree on an education program).

Neither the parties nor my research has found any case law which specifically addresses the issue of burden of proof in this context. Section 1415 provides that the court, after hearing evidence, "bas(e) its decision on the preponderance of the evidence." The question remains whether a court, conducting what has been described as a form of trial *de novo*, properly places the burden of proof on the party attacking the agency decision or the one attempting to uphold it.

Typically, in a review of an agency determination, the court requires that the party attacking the decision demonstrate that the agency's determination was not based on substantial evidence. Under § 1415, however, the burden is only to demonstrate that the Bureau's findings are not supported by a preponderance of the evidence. Therefore, placing the burden on the party seeking to overturn the agency's decision, yet making the burden less onerous than in the typical agency review situation, is consistent with the intent of the Act to make review easily accessible. Accordingly, the Town bears the burden of showing that the placement it devised for the year 1979-80 was appropriate for John Doe. In this case, however, the Doe defendants request relief not only for the year 1979-80, but for all later years to date. Since the Town has not prepared any educational plans for those later years, it cannot prove that they were appropriate for John Doe, Jr. Accordingly, with respect to those subsequent years the burden is properly on the Doe defendants to prove by a preponderance of the evidence the appropriateness of the relief they seek.

March 18, 1982
Date

/s/_____
Rya W. Zobel
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TOWN OF BURLINGTON and the SCHOOL COMMITTEE FOR THE TOWN OF BURLINGTON

vs.

THE DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS and JOHN DOE, ppa, JOHN DOE, JR.

MEMORANDUM OF DECISION

ZOBEL, D.J.

This is an action under The Education for All Handicapped Children Act of 1975 ("the Act"), 20 U.S.C. §§ 1401-20. The Town of Burlington and the School Committee of the Town of Burlington ("the Town") seek review of the determination of the Bureau of Special Education Appeals of the Massachusetts Department of Education ("BSEA") that the appropriate placement of Michael Panico* for the 1979-80 school year was at the Carroll School, Lexington, Massachusetts, a private school. Following a pretrial conference, I defined the triable issues to include not only the "appropriate" placement for Michael during the 1979-80 school year, but also the "appropriate" relief for subsequent years. The parties agreed that a subsidiary issue, whether the Town is liable for costs for medical evaluations, was a legal issue, and that they would stipulate as to the amount involved.

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* Although the names of the child and his father had been sealed, and these defendants styled as John Doe, Jr. and Sr., the parties agreed at trial to the use of their actual names.

The evidence at the trial included, in addition to the entire administrative record, the testimony of administrators and teachers of the Burlington school system, administrators and teachers of the Carroll School, Robert A. Panico, the father of the child, and two medical experts, Dr. Marcel Kinsbourne, called by the Town, and Dr. Melvin David Levine, called by Mr. Panico.

FINDINGS OF FACT

A. *Background and History.*

Michael Panico was born on September 7, 1970, the second of three children in the family. When he was in the first grade, his teacher, Beverly Reber, noticed that he had difficulty in attending to his business, that he progressed more slowly than other first graders in learning to read and that he appeared to be immature in comparison with his classmates. Ms. Reber conferred with the Panicos several times during the year and finally recommended that Michael repeat the first grade. Mr. Panico, in June 1977, requested a Core Evaluation of Michael, which was done. For reasons not relevant to this lawsuit, no Individualized Education Plan ("IEP") was developed for 1977-78.

Michael continued to exhibit problems during the 1977-78 school year. At his parents' insistence, physicians at the Massachusetts General Hospital tested Michael and, on the basis of their report, an IEP was developed for Michael and implemented in March 1978. The report showed that, although of superior intelligence, Michael had problems in spatial relationships which affected his reading and writing. Dr. Ira Lott, a member of the Massachusetts General Hospital team, also noted that Michael had developed some secondary emotional difficulties. Pursuant to the Plan, Michael spent five hours each week with a reading specialist, and he was to re-

ceive counseling once a week. Michael's parents and the administrative and academic specialists at the school monitored Michael's progress during the year, and, in the spring of 1979, Jean Arin, the Core Evaluation Administrator for the Burlington schools, suggested another evaluation. Before, during and after the evaluation, Michael's parents had numerous telephone discussions and meetings concerning the nature of Michael's difficulty and the future course proposed for Michael by the school. The parents were exceedingly anxious about Michael. They were also clearly dissatisfied, not only with the Town's assessment of his problems, but also the manner in which the Town had responded to Michael in the past and the program it devised for the future. As a result, many of the discussions with school officials were marked by misunderstandings and failures of communication.

The Town had, by May 1979, determined that Michael's general mental ability was "high average" or "superior," but that his ability to read was below age level. He had some memory deficits and a limited attention span. He was easily distracted and had difficulty completing tasks. Although he had developed some defense mechanisms to deal with his academic problems, he was frustrated by his inabilities. He suffered from migraine headaches and was found to have low self esteem and little self confidence in academic areas. At the team assessment meeting on June 4, 1979, which Michael's parents and school personnel involved in Michael's evaluation attended, Jean Arin recommended that Michael be placed in the classroom of John McAleer during the next academic year. Mr. McAleer's class provided a highly structured setting for a smaller number of children (six during 1979-80) with special academic and social needs. Ms. Arin reiterated the recommendations in the IEP which she prepared on June 26, 1979.

Mr. Panico rejected the IEP on July 3, 1979. During the summer he enrolled Michael at the Carroll School and re-

quested a hearing relative to the IEP from the BSEA. The hearing officer, by a decision rendered in January 1980, also rejected the IEP and determined that the Carroll School was the least restrictive, adequate program for Michael. She accordingly ordered the Town to pay the tuition and transportation costs associated with Michael's attendance at the Carroll School. The ruling of the hearing officer was based, not on a perceived inadequacy of the Plan but, rather, on her judgment that the Town was unable to implement it. The hearing officer doubted that John McAleer was experienced enough for the task and she found his classroom an inappropriate placement.*

B. *Michael's learning disability and special education needs.*

The parties are in agreement that Michael suffers from a learning disability and a great deal of resultant anxiety. While the precise nature or origin of his difficulty is in dispute, it appears to be undisputed that Michael's attention deficit is a substantial responsible factor. Two experts who are exceptionally well qualified in the field of learning disabilities testified at the trial. Dr. Levine, who was called as a witness by the Panicos, determined, after lengthy and complete neurological, psychological and physical examinations of Michael, as well as extensive testing, that Michael had a significant visual processing problem and a primary attention deficit. Although Dr. Levine regards the first problem as the more serious, he does opine that Michael's difficulties with visual analysis interact with his attention deficits to create "a synergistic affect that has

* The hearing officer's decision was greatly influenced by her finding that the Town had failed to comply with "educational and procedural mandates" and her further finding of "substantive and continuing procedural irregularity." These violations of state regulations, even if they were substantial, cannot, however, affect the determination under federal law of what the "appropriate" placement was.

compromised skill acquisition." Dr. Kinsbourne, who gave testimony on behalf of the Town, did not again examine and test Michael but instead studied existing test results, teacher evaluations and reports, and the transcript of the administrative hearing. He interviewed administrators and teachers at the Pine Glen School and, in particular, Mr. McAleer whom he also observed in the classroom. On the basis of that body of information, Dr. Kinsbourne, while acknowledging Michael's difficulty in organizing material and his directional confusion, attributes those problems and Michael's learning disabilities primarily to attention deficit.

Because the experts are in substantial agreement as to the manner in which Michael should be helped, I need not resolve the differences in their diagnoses, if indeed they are anything other than differences in emphasis. Both recognize that Michael needs individualized help in school, that he needs a multi-sensory and varied approach to reading, that he needs help in organizing material, that he needs to be encouraged to work independently, and that his teachers need to be aware of his attention deficit and be responsive to his needs. The experts' recommendations for meeting those needs differ only in one significant respect. While Dr. Levine suggests continued use of the Orton-Gillingham method and the strong phonetic training associated therewith, Dr. Kinsbourne prefers other approaches such as "Language Master" or the Helen Grush materials, which he views as closely related to Orton-Gillingham, yet more flexible. I find Dr. Kinsbourne's reasoning more persuasive. Michael had been taught according to the Orton-Gillingham method during the 1978-79 school year. He had mastered phonics, but was unable to become fluent. Moreover, his progress at the Carroll School, although good, did not significantly narrow the gap between his reading ability and the level of ability appropriate to his age.

C. *The IEP and the Town's ability to implement it.*

The IEP states that the objectives to be achieved for Michael by the Plan are to improve his reading and handwriting skills, to increase auditory and visual sequential memory processing skills, to continue his academic growth in all other areas, to increase his self-confidence, to improve his attention span and diminish distractibility, and to have him develop positive independent work habits for task completion.

I find those objectives dovetail in substantial measure with Michael's needs as found by both experts. Moreover, as far as it goes, the outline of Michael's learning style and physical constraints described in the IEP correspond to the views of Drs. Kinsbourne and Levine. The latter, of course, present far greater detail and deeper analysis. The Plan called for placement in Mr. McAleer's class where Michael was to receive small group and individual instruction for all language arts work. In that setting, Mr. McAleer was also assigned to work with Michael to overcome his attention problem. For music, art, and gym classes, Michael was to be integrated into the regular education program of the school and he was to take lunch and recesses with the children in the regular program. Furthermore, the IEP sets forth Michael's present levels of performance and provides for objective evaluation procedures.

The IEP was reasonably calculated to enable Michael to receive educational benefits. Michael would have been placed in a small class. The program was highly structured, with a well-integrated system providing immediate gratification through tangible rewards, as suggested by both experts. The IEP provided a means for Michael to achieve concentration skills, improved study habits, and increased word recognition and reading skills, taught through a method specifically tailored to him and his individual needs, closely related to the Orton-Gillingham method urged by both Dr. Levine and the Carroll

School, yet more creative and individualized. I find that the IEP was appropriate to meet Michael's needs.

The question remains whether the Town was able to implement the IEP. Mr. McAleer has been a special needs teacher for eight years, and he has a masters degree in special education. During the 1979-80 school year his class included six children from the second, third and fourth grades. Michael would have been one of the third graders. The classroom was divided physically into separate sections each of which served a different function—academic work, free time and game playing. Mr. McAleer, who was assisted in this class by another teacher, Adrienne King, works with each child individually for certain projects and groups of children with similar needs for other projects. The class is highly structured in the sense that Mr. McAleer established explicit rules of conduct and the children understood his expectations. At the same time he provided incentives and rewards to the children for academic and behavior achievements.

I find that Mr. McAleer was fully aware of Michael's needs and that he was able to carry out the provisions of the IEP. He had taught at least three other children with problems similar to Michael's during the five-year period preceding 1979 and understood the need for firmness with flexibility.

CONCLUSIONS OF LAW

The Act provides federal money to assist state and local agencies in the education of handicapped children. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 50 U.S.L.W. 4925, 4926 (U.S. June 28, 1982). To qualify for federal funds, a state must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate education." 20 U.S.C. § 1412(1).

To ensure a child's right to an appropriate education, the Act mandates, as an eligibility requirement of the states, that the local educational agency ("LEA") establish an IEP for each handicapped child, to be reviewed and revised at least annually. Secs. 1412(4), 1414(a)(5). The IEP must contain (1) a statement of the present levels of educational performance; (2) a statement of annual goals including short term instructional objectives; (3) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs; (4) the projected date for initiation and anticipated duration of such services; and (5) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. Sec. 1401(19).

The Act also imposes procedural requirements upon recipient states. Parents or guardians of handicapped children must be kept informed with respect to any proposed changes in the "identification, evaluation, or educational placement of the child or the provision of a free appropriate education to the child," and they are entitled to bring a complaint about any matter relating to the child's evaluation and education. Sec. 1415(b) (1) (C) and (E). A parent who is dissatisfied with the IEP developed for a child may appeal the LEA's prospective program. Sec. 1415. Parents have a right to an "impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency." Sec. 1415(b)(2). The statute provides further that parties aggrieved by the decision of the state educational agency shall have the right to bring a civil action in a district court of the United States, and that such court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing

its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." Sec. 1415(e)(2).

A handicapped child's right to a free appropriate public education entitles him or her to no more than "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley, supra,* at 4933.

"Almost as a checklist for adequacy," in its definitional section, the Act sets forth a number of specific standards to assure that a "free appropriate education" is provided. *Id.* The instruction and services must be afforded "at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP." *Id* Sec. 1401(18). "Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." *Rowley, supra,* at 4929.*

A reviewing court has but two inquiries; one, whether the state had complied with the procedures set forth in the Act; and, two, whether the IEP was "reasonably calculated to enable the child to receive educational benefits." *Id.* at 4933. In deciding the first issue, a court must not only "satisfy itself that the State has adopted the State plan, policies, and assurances required by the Act, but also determine that the State has

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* Obviously, more than one program may be appropriate. The reviewing court's role is merely to determine whether the one provided by the LEA satisfies these standards, not whether another program might also be appropriate, or even preferable. The Act does not entitle a handicapped child to the best possible education, merely a free appropriate one. *Bales v. Clarke,* 3 E.H.L.R. (CRR) 553:209 at 211 (E.D. Va. Oct. 16, 1981).

created an IEP for the child in question which conforms with the requirements of § 1401(19)." *Id.* at n.27.

Massachusetts has conformed with all of the Act's procedural requirements. The parents have been afforded the right to complain about the IEP proposed by the Town and have appealed to the state level. They do not in any respect dispute the manner in which those procedural rights have been affected. The proposed IEP conforms with §1401(19). It states Michael's present levels of educational performance, goals to be obtained as well as short term objectives, specific educational services and involvement in regular educational programs, time frames in which the program is to be applied, and objective evaluation procedures. The court is satisfied that Massachusetts has fully complied with the Act's procedural requirements.

The services promised in the IEP conform to the checklist in the Act. They were to be provided at public expense and under the supervision of the public schools, performed by a qualified special needs teacher in a classroom conforming to the State's special needs requirements and conducted within a regular school setting, with reference to the grade levels used in the regular classroom, integration into the regular classroom, and work materials similar to those used in regular classes as disirable. I also find, contrary to the finding of the state agency, that the Town was fully able to conform to the child's IEP which was, as I have already noted, in accord with the statutory requirements. Michael would have benefited from the personalized instruction and supportive services provided in the IEP.

Therefore, the Town has met its burden of demonstrating, by a preponderance of the evidence, that the placement in Mr. McAleer's class at the Pine Glen School was appropriate for the school year 1979-80. I find that the parents have failed to meet their burden of showing that for subsequent years such placement would have been inappropriate. Accordingly, the

Town is not responsible for the cost of Michael's education at the Carroll School for the academic years 1979-80 through 1981-82.

The parents have also sought reimbursement for certain medical expenses incurred as a result of extensive evaluations conducted on Michael in 1977 and 1978. These include an evaluation by Dr. Melvyn Levine in June 1977, and a neurological examination by Dr. Ira Lott in December 1977, conducted as a result of a referral by Dr. Levine. In addition, the parents seek reimbursement for tests conducted at Dr. Lott's recommendation at the Massachusetts General Hospital, and a subsequent follow-up neurological examination and evaluation by Dr. Lott in March 1978.

Under the federal and state regulations, parents are entitled to have independent evaluations conducted at public expense if they disagree with an evaluation obtained by the public agency, 34 C.F.R. 300.503(b), where they have notified the LEA in a timely manner that they intend to seek such evaluation, 603 C.M.R. § 328.3; *see also Norris v. Massachusetts Department of Education*, 529 F.Supp. 759, 769 (D. Mass. 1981). In addition, the team evaluation of a child, required by the Massachusetts regulations, 603 C.M.R. § 311, requires the input of a physician, who may, at the parents' request, be the child's own physician. 603 C.M.R. § 311.4. The regulations make no mention of the cost of the physician's required evaluation, although 603 C.M.R. § 311.10, part of the same section, specifically provides that a professional outside the school system, currently working with the child, may also participate but only at the parents' expense. Furthermore, correspondence from Jean Arin to the parents relative to the team evaluation meeting specifically informs them of their right to have their own physician conduct the assessment, and makes no reference to costs or to any other options available to them. I conclude, therefore, that Dr. Levine's June 1977 evaluation

shall be considered the physician's report required for the June team meeting and that its expense should be borne by the Town.

However, with respect to the subsequent referral to Dr. Lott and the testing conducted by him, there is no evidence either that it was the equivalent of similar evaluations conducted by the Town with which the parents disagreed or that the parents gave the Town prior notice that they intended to seek further testing. The notes of Jean Arin, admitted as evidence at the BSEA hearing, and at the trial, point to a finding, which I make, that the school was informed of the test results after they were conducted. While the Act entitles handicapped children to free evaluation under certain circumstances, parents may not unilaterally elect to have their child evaluated by private specialists and expect the LEA to pick up the bill. Therefore, the parents are not entitled to reimbursement of these expenses.

Within 20 days the Town shall submit a form of judgment in accordance with this decision.

August 13, 1982
Date

_____
Rya W. Zobel
District Judge

John DOE, Jane Doe, Joseph Doe, Plaintiffs,

v.

Dr. Gregory ANRIG, Massachusetts Commissioner of Education, Defendant.

John ANGIER, Judith Angier, and John Angier, Jr., Plaintiffs,

v.

Dr. Gregory ANRIG, Massachusetts Commissioner of Education, and the Wayland School Department, Defendant.

TOWN OF BURLINGTON and the School Committee for the Town of Burlington, Plaintiffs,

v.

The DEPARTMENT OF EDUCATION OF the COMMONWEALTH OF MASSACHUSETTS and John Doe, as he is father and next friend of John Doe, Jr., Defendants.

Civ. A. Nos. 79-909-Z(A), 79-2144-T(A) and 80-0359-Z(A).

United States District Court, D. Massachusetts.

March 7, 1983.

Anne M. Vohl, Burlington, Mass., David Berman, John F. Zamparelli, Town Counsel, Medford, Mass., for plaintiffs.

Linda M. Irvin, Terry Jean Seligmann, Asst. Atty. Gen., Boston, Mass., for defendants.

Diana S. Gondek, Boston, Mass., for School Committee of Westwood.

Gerald B. Gallagher, Acton, Mass., David Rosenberg, Hill & Barlow, Boston, Mass., for defendant John Doe and John Doe, Jr.

Ellen Janos, Asst. Atty. Gen., Boston, Mass., for defendant Dept. of Educ.

Jeffery Jones, Palmer & Dodge, Boston, Mass., for Town of Wayland School Committee.

Bruce E. Mohl, Asst. Atty. Gen., Boston, Mass., Jim Oliver, Boston, Mass., John Graceffa, Weymouth, for Anrig.

OPINION

BAILEY ALDRICH, Senior Circuit Judge.*

This opinion consolidates three cases raising questions of the right to reimbursement for tuition and travel expenses for handicapped children paid during review proceedings testing the correctness of the school committee's educational and placement decision. The statutes involved are the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§ 1401 *et seq.*, and its counterpart, Mass. G. L. c. 71B (Massachusetts law). The cases embraced are the *Town of Burlington v. Department of Education,* 1 Cir., 1981, 655 F.2d 428 (*Burlington*), here on remand; *Doe v. Anrig,* 1 Cir., 1982, 692 F.2d 800 (*Westwood*), also on remand; and *Angier v. Anrig (Wayland*), a new case. *Burlington's* child is Michael, *Westwood's* is *John and Wayland's* is Junior. All are admittedly

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* Sitting by designation.

handicapped; their correct placement has been finally determined,[1] and the only remaining issue is reimbursement.

Facts
Burlington

During the school years 1977-78 and 1978-79 Michael experienced learning problems in the second and third grades at a public school, Memorial. An IEP was prepared for him in the spring of 1979 for a special program at another public school, Pine Glen. The father sought review by the Department of Education's Bureau of Special Education Appeals (BSEA). Prior to the commencement of the hearings in September, he transferred Michael, at his expense, to Carroll School, a private school specially qualified to teach handicapped children. In January, 1980 the BSEA upheld his decision and ordered the town to repay him for past, and to pay the future Carroll tuition, informing the town that it might seek review in either state or federal court. The town responded with an appeal to this court, naming the Department and the father, with one count seeking EAHCA review, and a pendent count seeking a state type review. It sought, unsuccessfully, a stay of the BSEA's order requiring it to make interim payments to Carroll, and appealed from that ruling. (Appeal #1) When threatened by the Department with a cut-off of all special education funds, the town agreed, without prejudice, to make the current, but not past, payments. On the merits, the court thereafter granted summary judgment against plaintiff town on the state count, concluding that the BSEA's decision was supported by substantial evidence. The town appealed that order as well. (Ap-

[1] This is not true as to *Wayland*, but is assumed in the parents' favor for purposes of Wayland's present motion for summary judgment.

peal #2) Subsequently defendants obtained a preliminary injunction enforcing the BSEA's order to reimburse past tuition without awaiting final determination. The town appealed therefrom. (Appeal #3)

[1,2] Thus there were three appeals which the court took, aided by a certification under F.R.Civ.P. 54(b), prior to a trial on the merits of the federal count as to the appropriateness of Michael's IEP. The court's first action was to order a dismissal, on the merits, of the pendent state count, Appeal #2. The state standard of review of an agency decision is the customary one, requiring the petitioner to show the decision was unsupported by substantial evidence. The special federal review under section 1415(e)(2), a provision apparently drawn by proponents of judicial activism, calls for a full trial de novo, with additional evidence, the court to make its own factual determination based on a preponderance of the evidence.[2] Pointing out that a state type review could lead to an affirmance of the BSEA's decision, while an EAHCA review could pro-

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[2] The writer of this opinion in no way minimizes the importance of providing special education for handicapped children. However, with the enormous demands, criminal, for which there must be a speedy trial, and civil of all sorts, upon a limited number of federal judges, the concept that each handicapped child in the country who is receiving federal aid should be entitled, after he has already received a comprehensive agency hearing and a formal review, *see* Mass. G. L. c. 71B, § 3; 20 U.S.C. § 1415(b)(2) & (c), to a trial de novo of the appropriateness of his allotment seems entirely out of balance with national demands. In the *Burlington* case alone, for one child, there were 577 pages of administrative transcript, considerable documentary evidence, and new live expert testimony, together submitted to the court for a full redetermination. The activities of counsel led to 198 docket entries prior to the first appeal, with over 100 more to date. Admittedly this is unusual, but counsel entitled to trials de novo are often not given to restraint.

By the same token, the statute is self-defeating. An IEP determination necessarily calls for prompt implementation. The statute, quite properly, calls for a continuation of the status quo until final review. Section 1415(e)(3), post. As a practical matter, one may ask in how many cases will a trial de novo be accomplished before the pertinency of the IEP has expired?

duce a reversal, on Appeal #2 the court held that such inconsistency would violate the federal act. The state count was accordingly dismissed, leaving the federal count for trial.

On Appeal #1 the court upheld the denial of the stay, ruling that the town had not shown irreparable harm, viz., had not shown that the father would not be able to repay the tuition if he ultimately lost. Similarly, on Appeal #3 the court ruled the father had not shown irreparable harm in not being reimbursed forthwith for past tuition. The whole tenor of the opinion in remanding for trial of the federal count on the merits was that reimbursement could be had, either by the father or by the town depending on the ultimate finding. Following remand and a trial, another judge of this court found the town's IEP to have been appropriate for all three years and, accordingly, ruled that the town was "not responsible for the cost of Michael's education at the Carroll School for the academic years 1979-80 through 1981-82." For reasons that will be come to, both parties, however, seek reimbursement for what they have paid.

Westwood

John's disability—Down's Syndrome—was so severe that he had been maintained almost since birth at Crystal Springs School, a residential facility, at his parents' expense. In 1975 they sought an IEP, hoping to pass some of this expense on to the town. Westwood's first response was an IEP for non-residential placement in public school after a final transition year of continued residential placement. The parents objected to this, and the parties negotiated a cost-sharing agreement for continued placement at Crystal Springs. In September, 1977 the parents requested a new IEP, and on November 15 one was issued for non-residential placement in a public school, commencing immediately. The parents rejected this second IEP and appealed to the BSEA, which in due course found the IEP generally appropriate. The parents sought review in

this court. At all times John remained at Crystal Springs. After trial, the district court's opinion stated that a residential placement was appropriate for the year 1977-78, and that the town was responsible for the tuition and expenses for that year. The judgment said nothing about reimbursement.

On appeal the court affirmed the district court's Crystal Springs placement decision, but discovered problems with respect to reimbursement. First, it held that section 1415(e)(3), requiring interim continuance of placement, had nothing to do with the eventual settling of accounts. The court then turned to section 1415(e)(2) and declined to construe its authorization language, to "grant such relief as . . . is appropriate," as providing for reimbursement. Rather, the court ruled that although the parents would have been relieved of all expense had the town made the correct decision in the first place, they could not now be awarded reimbursement. For this it cited *Anderson v. Thompson*, 7 Cir., 1981, 658 F.2d 1205, a case, it so happened, from the visiting writing judge's circuit. The court stated that the First Circuit had never considered this issue before, making no-mention of its apparent rulings in *Burlington*.

Again citing *Anderson v. Thompson*, the *Westwood* court indicated there could be two exceptions to its general ruling against reimbursement; one, if the change effected by the parents was necessary to protect the physical health of the child, and two, if "the school officials have acted in bad faith by egregiously failing to comply with the procedural provisions of the Act," 692 F.2d ante, at 811. Admittedly, neither exception was presented.

The court then turned to the pendent state claim, and observed that Massachusetts permitted reimbursement in some instances, citing *Amherst-Pelham Regional School Committee v. Department of Education*, 1978, 376 Mass. 480, 381 N.E.2d 922. Pointing out that the present circumstances were somewhat different, the court said that it would not decide the

Massachusetts law itself, and remanded for that purpose. The court failed to note that in *Burlington* it had ordered the pendent state count dismissed because of conflict and consequent preemption.

Wayland

During the fall of 1977 Junior, a second grade student at Loker, a public school, was placed in a diagnostic IEP, and in December was given an IEP which the parents accepted for the time being although, contrary to the statutory requirements, they had been excluded from the hearing. The IEP called for continued placement, but with special services, at Loker. The winter of 1978 did not go smoothly, with Junior unable to perform school work adequately. Wayland recommended an outside summer program, at the parents' expense. Junior undertook a program at Carroll School. In August the parents rejected the 1977 IEP, and shortly thereafter enrolled Junior at Carroll for the 1978-79 school year. They requested funding for an independent evaluation of Junior at the Children's Hospital. When this was refused they proceeded with the evaluation nevertheless, and submitted it to Wayland on November 2, 1978. On November 27, they inquired why no IEP was being prepared, and only on January 19, 1979 did Wayland produce a new one. This varied little from the former, and, again, the parents had not been notified to participate. They immediately rejected this plan, and appealed to the BSEA. No hearing was held until April, and as soon as it started the officer disqualified himself. The hearing was recommenced in June. While it was progressing Wayland submitted IEP #3 for the forthcoming year to the parents, again with little change. This time the parents were given a week's notification of the hearing by mail, but on receipt they replied, by telephone, that it did not give them time to consult with their attorney, who was away, and that they did not feel they should attend without her advice.

Wayland made no apparent effort to reschedule, and again prepared an IEP without the parents' involvement, who then rejected it.

The BSEA thereafter held for Wayland, ruling that, despite various procedural violations, Wayland's second and third IEPs were appropriate. The parents filed suit in this court in October, 1979. Wayland conducted no review for the years 1980-81 and 1981-82. For 1982-83 the parents requested an IEP relating to reentry by Junior into public school, and an IEP acceptable to both parties was arrived at and initiated.

Procedural Matters

Pendent Jurisdiction

[3] The state law claims, to the extent that any exist, are so tied in, both factually and legally, with the federal claims that the court, in the exercise of its discretion, declines to dismiss any on the ground of insufficient pendent jurisdiction.

Certification

Some of the parties wish questions to be certified to the Massachusetts Supreme Judicial Court, and the Court of Appeals has indicated in *Westwood,* but not dictated, that this might be done. The court has considered the matter, but declines to do so, in part because, until the Court of Appeals has resolved all the federal questions raised herein, it will be difficult to be sure just what questions it might be desirable to certify.

Issues

Burlington

(1) The father seeks reimbursement for the 1979-80 tuition he paid to Carroll, as well as 1979-80 travel expense, and

(2) seeks town payment of the balance of 1981-82 tuition owed Carroll.

(3) The town seeks reimbursement for the Carroll tuition and travel expense it paid for in 1980-81 and 1981-82 as a result of the ultimately reversed BSEA order and the Department's threat to cut off all funds.

Involved in these issues is the question whether Michael's transfer to, and continued placement at, Carroll was in violation of section 1415(e)(3).

Westwood

John's placement at Crystal Springs, although contrary to the IEP, preceded it. Accordingly, this continuing placement was required by section 1415(e)(3). However, when it finally proved to be correct, the town declined to reimburse the parents for the expenses which, had it made a proper IEP, it would have been obliged to pay from the beginning. This presents the question of the parents' right of reimbursement, (4) under federal law, and (5) under Massachusetts law.

Wayland

The parents, after the IEP, and contrary to section 1415(e)(3), transferred Junior to Carroll. The BSEA upheld the IEP. In this court the parents seek to overturn the BSEA and the IEP and obtain reimbursement for the Carroll tuition and travel expense. The town moves for summary judgment, arguing that even if after a hearing on the merits this court should reverse the IEP, the parents would not be entitled to reimbursement. Accordingly, question (6) is whether the parents, having made a transfer contrary to section 1415(e)(3), nevertheless may in the particular circumstances recover tuition if their choice is ultimately upheld.

Conclusions

Burlington

If this court were to follow the language and seeming rationale of the court's *Burlington* opinion, the answer to all

three questions would seem plain, and to depend simply on who was the ultimate winner with respect to the IEP, viz., the town. The father contends otherwise. In view of the complexities raised, questions (1)—(3) will be left to last.

Westwood

With the greatest respect, this court states that it finds itself unhappy with the Court of Appeals' decision in this case. John's parents were in a bind. Under section 1415(e)(3) they were clearly entitled, as the court recognized, to retain John in his placement at Crystal Springs, but were obliged, under the existing cost agreement, to continue to pay John's expenses. Indeed, but for the agreement, they would have had to pay tuition as well.[3] To have moved him to public school, pending review, would have effected exactly the interruption section 1415(e)(3) was designed to prevent, and would have seriously diminished the value of their success, if they achieved it, viz., by the interruption of two transfers. However, when it was determined that Crystal Springs was, substantively as well as procedurally, the correct placement, the court says that, at least under federal law, the parents must still foot the bill. Having in mind that, in addition, they must pay counsel, this is surely a Pyhrric victory. Although the court noted that section 1415(e)(2) permits the court "to grant such relief as . . . is appropriate," it held, without discussion, except to rely on *Anderson v. Thompson,* ante, and *Miener v. Missouri,* 8 Cir., 1982, 673 F.2d 969, *cert. denied,* —— U.S. ——, ——, 103

[3] "Section 1415(e)(3) is designed to preserve the status quo pending resolution of administrative and judicial proceedings under the Act. It amounts to an automatic stay preventing any change in a child's location and educational program, except by agreement of the parties. The section has been interpreted—correctly, we think—to require that whoever was paying for the placement prior to review shall continue to do so while review is pending." 692 F.2d, ante, at 810. (Citation omitted.)

S.Ct. 215, 230, 74 L.Ed.2d 171 which followed *Anderson*, that it was not appropriate to require the town to pay what it properly should have paid in the first place.

If one looks to *Anderson v. Thompson*, for the reason for this result, it is that the court found no Congressional intent to subject towns to claims for "damages." Extrapolating largely from the shortness of available funds, the *Anderson* court concluded,

> "When a school district makes a good faith effort to provide a child with an appropriate education, we do not believe that as a general rule it is good policy to require that a school district pay money damages if it later turns out that a different programming decision should have been made.
>
> . . . .
>
> "[A] general damage remedy would hinder rather than help the very children for whose benefit the statute was enacted." 658 F.2d, ante, at 1213.

In this court's opinion, with respect, the *Anderson* court failed adequately to note the difference between general damages, which could be a very serious matter, and reimbursement for tuition payments that would have been the town's responsibility under the appropriate IEP. For the successful parent to be left with what should have been the town's bill ab initio does not seem a municipal protection that Congress would have intended, however great the shortage of funds. For a further discussion and citation of cases, see *Matthews v. Ambach*, W.D.N.Y., 1982, 552 F.Supp. 1273, 1278-79.

[4, 5] This court, while it would hope that the Court of Appeals might reconsider its *Westwood* decision, is bound

thereby, and can do nothing for the parents under EAHCA, question (4), and so turns to its instruction to consider the Massachusetts law, question (5).[4] Reimbursement to the successful parent was ordered in *Amherst-Pelham Regional School Committee v. Department of Education,* 1978, 376 Mass. 480, 381 N.E.2d 922. It is true that the court granted relief based on a regulation that provided for reimbursement if the BSEA upheld the parents' decision, whereas, in the present case, the BSEA did not and it was this court that did so. However, there had been a claim even in *Amherst-Pelham* against the regulation, as going beyond the statute and the court stated that it would give deference to the agency's views that reimbursement furthers the statutory aims. This court believes that the Massachusetts court would continue that approach, and construe the regulation as embracing a decision of this court when it, although not the BSEA, determines that the IEP should have adopted the parents' view. It holds for the parents on the pendent Massachusetts count, question (5).

Wayland

[6] The court has no difficulty in deciding question (6) in favor of the parents, in spite of their having disregarded the IEP, as it considers the case to fall squarely within the second *Anderson v. Thompson* exception, if "school officials have acted in bad faith by egregiously failing to comply with the procedural provisions of the Act," recognized in the *Westwood* opinion, 692 F.2d, ante, at 811. Obviously every procedural

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[4] Contrary to defendant's claim, the complaint and papers throughout this case sufficiently raised, although perhaps not as clearly as would be desirable, a claim for reimbursement. If there has been any misunderstanding, the pleadings and/or pretrial order can be amended. There is no prejudice, as the questions are legal and not factual, and full opportunity for briefing has been provided. The court, indeed, would compliment the Attorney General on his brief, even though it largely does not agree with it.

violation does not equal bad faith. On the other hand, some specified procedures may be so important, substantively, that subjective good faith, even if there were such, cannot protect against gross disregard. The presence of parents with their input is of utmost importance for the child's sake, and perhaps for their own as well. It is provided in the Massachusetts regulation, 603 C.M.R. § 311.7, that a parent "shall" be a member of the TEAM. The federal regulation further provides, 34 C.F.R. § 300.345,

> Parent Participation.
> (a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:
> (1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and
> (2) Scheduling the meeting at a mutually agreed on time and place.

Wayland gave the parents no notification whatever of the 1978 meeting. It gave only short notice in 1979, and apparently made no attempt to postpone. In addition, 34 C.F.R. § 300.343, requires annual review of the IEP. This requirement, too, was violated, since no meetings with respect to Junior were conducted between June, 1979 and spring, 1982.

The primary importance of the Act's procedural safeguards was pointed out in *Anderson v. Thompson*, 658 F.2d, ante, at 1211, 1214. *See, also, Board of Education v. Rowley* (1982) _____ U.S. _____ & n. 6, 102 S.Ct. 3034 & n. 6, 73 L.Ed.2d 690. To reward Wayland for their flagrant disregard by requiring properly acting parents to pay bills which, on the appropriate IEP, the town should have paid from the start, would offend the clear spirit of both the EAHCA and the Massachusetts statute. Possibly the parents' input would have

resulted in a different IEP in the first place. In any event, it would be difficult to think of a better way to encourage committee irresponsibility. Nor, finally does the court accept the argument that Junior was moved before the 1978, and subsequent, violations. The transfer followed a similar 1977 disregard. It was not a waiver for all time that the parents first tried to see if the 1977 IEP would work. Thus if, on the merits, the parents' placement is ruled to be the correct one, Westwood's exception to its general rule against reimbursement would permit recovery.

Burlington Revisited

The Court of Appeals remanded *Burlington* for determination of the correctness of the IEP. Now that it has been sustained, and the town declared not responsible for the 1979-80 through 1981-82 years, the father says that, nevertheless, and in spite of the seeming directions in the court's opinion, he should be reimbursed for his 1979-80 payments and the unpaid 1981-82 tuition, and should not have to reimburse the town for its 1980-81 and 1981-82 payments. Although only by reading *Westwood* as implicity contradicting the *Burlington* court's opinion do these matters still seem open, we address his contentions.

The court believes a threshold question to be whether Michael's transfer to Carroll in September, 1979 contrary to the IEP, was a violation of section 1415(e)(3). This section provides,

> "During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then *current* educational *placement* of such child, . . ." (Emphasis suppl.)

No question regarding this section was apparently raised in the district court until February, 1981. In connection with its

then order that the town reimburse the father pendente lite for the 1979-80 tuition, (Appeal #3), the district court, referring to this section, stated,

> "This mandatory provision, designed to preserve the status quo, has been held in this case to require that John Jr. be maintained at the Carroll School during the pendency of this litigation. Judgment and Memorandum of Decision November 19, 1980."

In fact, its November memorandum and order had not mentioned it. Rather, it had noted, for purposes of the state count, that the BSEA had held Carroll School to be the appropriate placement. Not only was the federal statute not mentioned, but the court did not address the factual circumstance that the father had transferred Michael to Carroll during the review process, after the IEP. A close reading of the *Burlington* opinion, in turn, indicates that the Court of Appeals also proceeded under the assumption that Carroll was the "current . . . placement." The language of the opinion, and the recitation of the facts at the start, however, indicate that this was a mistaken impression of the facts rather than a legal conclusion. Nor did anything turn on its correctness.

[7] This court does not read section 1415(e)(3) as authorizing a parent to reject an IEP, unilaterally move the child to a private school, claim this to be the "current . . . placement" from then on, and then, even when the transfer proves to have been unjustified, still expect the town to pay the bills. *See Stacy G. v. Pasadena Independent School District,* 5 Cir., 1983, 695 F.2d 949; *Stemple v. Board of Education,* 4 Cir., 1980, 623 F.2d 893, *cert. denied,* 450 U.S. 911, 101 S.Ct. 1348, 67 L.Ed.2d 334. This would be to turn inside out a statute designed to hold matters in abeyance, and to respect

the existing placement.[5] To permit reimbursement when the parents, without excuse, unilaterally transferred the child to a private placement during the review process could only serve to encourage parents to disregard the statutory scheme; they would have nothing to lose. The fact that in this case the transfer also ultimately proved incorrect only reinforces this conclusion.

[8] Faced with this federal difficulty, and despite the fact that *Burlington* was not encouraging on the applicability of state law, the father would now rely on a state regulation, 603 C.M.R. § 504.5(f), which provides for reimbursement if a parent's placement contrary to an IEP is upheld by the BSEA. He argues that this regulation provides for reimbursement regardless of whether the BSEA decision for the parents is reversed by a court, in part reasoning that parents should be able to rely on the BSEA decision. This would seem to read too much into the regulation. The court does not believe that the state court would construe this regulation to permit reimbursement when the administrative decision has been reversed by a court on appeal, or, if it so reads, would give it validity. Indeed, if it should do so, the state rule would very likely be preempted by federal law.

The father would posit a different result with regard to having to repay to the town what he had received on account of the later years, asserting a letter from the Department's counsel, an assistant attorney general construing section 1415(e)(3) in his favor. In addition to being a mere legal opinion, it was written long after he had incurred the expense.

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[5] It is true that in this particular case Michael's IEP proposed a transfer from one public school to another public school, so that, strictly speaking, there was no proposed "continued . . . placement." However, the statute cannot be read in such circumstances to permit the parent, without town agreement, to choose some private school and confer thereon the imprimatur of continued placement.

The Department was not only mistaken on the law, it would seem even more ill-advised in threatening the town with cutting off all its funds if it did not obey its order to make future payments for Michael to Carroll until the IEP was finally determined. This was not a case where the town was legally obliged under section 1415(e)(3) to continue payments preserving the status quo, but was an interference by the Department, supported by its economic power, enforcing an order still subject to review. Certainly this could not be the basis for a final decision on liability. If the threat is to be regarded as other than wrongful, it could only be on the assumption that the payments were to be returned if the order was ultimately reversed.

The difficulty here is that the Department is in the comfortable position of not being itself accountable if proven to be in error. The Eleventh Amendment protects it even when, as a recipient and distributor of federal funds, it orders a town to make payments in violation of the federal act. *See Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Ass'n,* 1981, 450 U.S. 147, 150, 101 S.Ct. 1032, 1034, 67 L.Ed.2d 132 (per curiam); *Edelman v. Jordan,* 1974, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662; *Miener v. State of Missouri,* 673 F.2d, ante, at 980-82. However, there is not reason why the town should be barred from obtaining repayment from the parent on whose behalf its funds were so spent by duress. This is a different case from *Westwood;* the payments were not only not owed, they were made involuntarily.

The court is not moved by the fact, with regard to repayment, that the state and federal act provide different standards of review. As was pointed out in *Westwood,* the federal act is the name of the game, and it cannot be that the BSEA is reversed and not reversed.

In *Burlington* there remains the question of the amount of the town's recovery. The court does not accept the argument that defendant parent is entitled to offset the town's so-called average cost per student. Rather, the burden will be on defendant to show the town's actual savings, such as marginal costs it would have incurred in any case, and funds received from the state for Michael's education. The case is continued for this purpose.

In *Westwood*, judgment is to be entered for the parents.

In *Wayland*, the town's motion for summary judgment is denied; the case to stand for trial on the merits of the IEP.

TOWN OF BURLINGTON, et al.,
Plaintiffs, Appellees,
v.
DEPARTMENT OF EDUCATION FOR the
COMMONWEALTH OF MASSACHUSETTS, et al.,
Defendants, Appellants.

TOWN OF BURLINGTON, et al.,
Plaintiffs, Appellees,
v.
DEPARTMENT OF EDUCATION FOR the
COMMONWEALTH OF MASSACHUSETTS,
Defendant, Appellee,

John Doe, etc., Defendant, Appellant.

TOWN OF BURLINGTON, et al.,
Plaintiffs, Appellants,
v.
DEPARTMENT OF EDUCATION FOR the
COMMONWEALTH OF MASSACHUSETTS, et al.,
Defendants, Appellees.

Nos. 83-1424 to 83-1426.

United States Court of Appeals,
First Circuit.

Argued Nov. 8, 1983.

Decided May 29, 1984.

David W. Rosenberg, Boston, Mass., with whom Hill & Barlow, Boston, Mass., was on brief, for John Doe, etc.

Ellen L. Janos, Asst. Atty. Gen., Government Bureau, Boston, Mass., with whom Francis X. Bellotti, Atty. Gen., Boston, Mass., was on brief, for Dept. of Educ. for Com. of Mass.

David Berman, Medford, Mass., with whom Berman & Moren, Medford, Mass., was on brief, for Town of Burlington, et al.

Before CAMPBELL, Chief Judge, SWYGERT,* Senior Circuit Judge, and BOWNES, Circuit Judge.

BOWNES, Circuit Judge.

On appeal to this court a second time, all parties urge that the district court committed reversible errors in a case arising under the Education for All Handicapped Children Act (EAHCA or Act), 20 U.S.C. §§ 1401-1461. The first appeal generally involved motions for preliminary injunctions concerning the interim educational placement and funding for a learning disabled child, there referred to as John Doe, Jr.,[1] *see Town of Burlington v. Department of Education*, 655 F.2d 428 (1st Cir. 1981) (hereinafter *Burlington I*). The current appeal presents a wide variety of novel issues under the Act. These include: the choice of law to be utilized in the state due process hearings; the impact of a school system's regulatory violations on the validity of a child's IEP; the weight to be accorded to the state administrative record and the hearing officer's findings upon appeal; the meaning of the term "additional evidence" as used in the Act; the appropriate burden of proof at trial for the years subsequent to the contested IEP, and the significance of a diagnostic determination by the trial judge. Reimbursement issues include the effect of a unilateral parental transfer of the child to a school not authorized by the

* Of the Seventh Circuit, sitting by designation.

[1] At trial, the parents allowed themselves and their child to be referred to by their real names. To avoid confusion with our earlier case, we will continue to refer to the parents as Mr. & Mrs. Doe and the child as John.

individualized educational program (IEP) formulated by the school system; the impact of parental reliance on and implementation of a state administrative decision; and bad faith as a bar to reimbursement.

In view of the protracted procedural background of the case which has included two published opinions, *see id.* and *Doe v. Anrig*, 561 F.Supp. 121 (D.Mass.1983) (Aldrich, J., sitting by designation) (consolidated case including *Burlington I* on remand) we will first recount its procedural history. The factual background may be found in the above-cited opinions. We shall then review the alleged errors according to the chronological progression of the case beginning with those alleged to have occurred at the state administrative level.

Prior Proceedings

John had completed the third grade at a regular public school when his parents invoked the administrative appeals process in July 1979 to review an IEP and placement the Town of Burlington (Town) proposed to implement the following September. Mediation failed and in August the parents placed the child in a private school, the Carroll School. A state due process hearing was held by the Massachusetts Bureau of Special Education Appeals (BSEA) over four days in the autumn of 1979. The BSEA hearing officer rendered a decision in January 1980 in favor of the private school placement, holding the Town's IEP to be inadequate and inappropriate for the child's special needs. The Town then commenced a two-count action in the district court against the State and the Does, seeking to reverse the BSEA order on the basis of both the federal Act, 20 U.S.C. § 1415(e)(2), and the corollary state Act, Mass.Gen.Laws Ann. ch. 71B, §§ 1 *et seq.* The federal and state acts have different standards of review.

The district court denied the Town's request for a stay of the BSEA order that the Town fund the child's education at the Carroll School, and on the state count found in favor of the defendants on a motion for summary judgment.

On appeal to this court we, *inter alia,* vacated the grant of summary judgment and directed that the pendent state count be dismissed, holding that the "federal specification for review, when invoked, seems to us designed to occupy the field over an inconsistent state provision." *Burlington I,* 655 F.2d at 431. The federal claim was remanded for trial.

At the conclusion of a four-day trial, the district court, Zobel, J., reversed the State BSEA finding and held that the Town's IEP was adequate and appropriate. The case was then transferred and consolidated with two others to determine whether the Town's remedies included reimbursement for tuition and travel expenses. The district court, Aldrich, J., sitting by designation, determined that reimbursement was available to the Town as the prevailing party.[2] The case was transferred back to the original district court and an order issued requiring the parents to repay the Town the tuition, transportation costs, and other expenses related to the child's education at the Carroll School for the prior three years. This appeal ensued with the Department and the parents alleging both legal and factual errors in the district court. The Town cross-appeals on the limited issue of the method used to calculate the appropriate reimbursement and the amount thereby awarded. It must be emphasized that the State is not, as is usually the case, aligned with the Town on this appeal. The State's position parallels that of the Does. It urges that the district court erred in reversing the decision of the state educational agency as to the appropriate educational placement for the child.

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[2] We later endorsed the availability of equitable reimbursement to a prevailing party in *Doe v. Brookline,* 722 F.2d 910 (1st Cir. 1983).

Statutory Overview

Since our opinion focuses on 20 U.S.C. § 1415, which is reproduced in its entirety as an appendix, some basic observations are in order. This section of the Act requires state and local educational agencies to establish and maintain certain procedural safeguards for handicapped children and their parents or guardians. § 1415(a).

Subsection (b)(1) sets forth the required procedures, which shall include, but shall not be limited to—

> (A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;
>
> (B) [procedures when parents and guardians are not known or when child is a ward of the state];
>
> (C) written prior notice to the parents or guardian of the child whenever such agency or unit—
>
> (i) proposes to initiate or change, or
>
> (ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;
>
> (D) [notice of all available procedures required to be in parents' or guardian's native language];
>
> (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

Subsection (b)(2) provides for a hearing:

> Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. . . .

Subsection (c) gives "any party aggrieved by the findings and decision rendered" in the hearing under (b)(2) the right of an "appeal to the State educational agency which shall conduct an impartial review of such hearing." Subsection (d) enumerates the rights accorded parties to hearings.

Subsection (e)(2) opens the courtroom doors to any party aggrieved by the decisions rendered under subsections (b) and (c) by providing that such party

> shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Subsection (e)(3) is addressed to the placement of the child during the pendency of the section 1415 proceedings. Subsection (e)(4) vests jurisdiction in the district courts of the United States.

[1, 2] For the reasons set forth in detail in the main part of our opinion, we find that § 1415 gives the federal court the authority to enforce both federal and relevant state law. "Relevant" state law is law which is not inconsistent with the federally-mandated requirements — both substantive and procedural — of the Act. "Relevant" state law includes, *inter alia*, procedural safeguards which are more stringent than the required procedures set forth in subsection (b). This is made evident by the first sentence of the subsection: "The procedures required by this section *shall include, but shall not be limited to . . . ,*" § 1415(b)(1) (emphasis added). State law that is inconsistent with the federally-mandated procedures cannot, of course, be enforced by a federal court; it is not within § 1415(e)(2) jurisdiction. In this case, we deal with state statutes and regulations that are consistent with but higher than the federally-mandated standards. Section 1415 mandates that the federal court enforce such statutes and regulations. We now turn to an exegesis of the federal Act and an analysis of the specific issues.

I. THE STATE ADMINISTRATIVE PROCEEDINGS

In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Supreme Court discussed the proper scope of judicial review in actions brought under 20 U.S.C. § 1415(e)(2): "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* at 206-07, 102 S.Ct. at 3051 (footnotes omitted). In view of the state hearing officer's findings that the Town violated numerous state and federal laws in handling the child's

special educational plans, the State and the Does — appellants here — challenge the failure of the district court to determine whether the Town complied with the procedures mandated by the federal Act and the corollary state Act. The Town responds by arguing that the hearing officer's findings were essentially *ultra vires*. The resolution of this question requires us to determine whether the state due process hearing, a central feature of the federal Act, was defective.

The appellants urge as error the district court's refusal to give any weight to the hearing officer's determination that the Town violated numerous state substantive and procedural regulations plus several federal provisions in its handling of the child's special education. The Town's response is that findings concerning past practices regarding compliance with state educational standards and procedures were irrelevant to the question appropriately before the hearing officer, *viz.*, is the IEP proposed by the Town adequate and appropriate? Thus, in the Town's view, the district court properly ignored those findings. The Town raises two other objections to the findings. First, it argues that it was not given fair notice of the procedural or reimbursement issues in violation of the due process clause of the fourteenth amendment, U.S. Const. amend. XIV, § 1, and the Massachusetts Administrative Procedure Act, Mass. Gen.Laws Ann. ch. 30A, § 11(1) (West 1979), and, second, that the hearing officer's consideration of the prior years of the boy's education was unnecessary and erroneous. We first address the question of notice.

A. *Fair Notice*

We note at the outset that the impartial due process hearings authorized by the Act are to be conducted in accordance with state law. 20 U.S.C. § 1415(a).[3] This principle is limited only

[3] Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall

where the federal Act and regulations mandate different or more stringent procedural protection on a given point than does state law. *See* 20 U.S.C. § 1415(b)(1) ("The procedures required by this section shall include, but shall not be limited to . . ."). In regard to notice, the federal Act speaks only to "written prior notice to the parents or guardian of the child" regarding certain actions a state or local educational agency might take in relation to a disabled child, *see* § 1415(b)(1)(C). We find no federal procedural provision preempting state law on the question of fair notice of issues to be decided at the due process hearing. We turn, then, to state law.

[3] The Massachusetts Administrative Procedure Act in pertinent part provides:

> (1) Reasonable notice of the hearing shall be accorded all parties and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument. If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues.

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establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

20 U.S.C. § 1415(a). Section 1415 is entitled "Procedural Safeguards" and contains the requirements for due process hearings under the Act. *See also* § 1415(b)(2) and (c).

Mass.Gen.Laws Ann. ch. 30A, § 11(1). The Town's claim of inadequate notice of the procedural issues is disingenuous. In a memorandum dated November 28, 1979, submitted by the Town to the state hearing officer, one section is entitled "There is no proof of procedural irregularity and no harm or prejudice to the [Does]." Additionally, uncontroverted testimony and exhibits submitted at the administrative hearing indicate that Mr. Doe met with the Town's School Committee in executive session to alert it to what he viewed as substantive and procedural irregularities in the handling of his child's special education. Adequate notice was provided to the Town on the procedural issues.

We also find that the Town had adequate notice under § 11(1) of the reimbursement issues. While the corroborating documents were not put into evidence until the last day of the hearing, testimony from Mr. Doe on the first day of the hearing (September 26, 1979) and from Mrs. Doe on the last day (November 1) was directed to whether the Town had provided them with the information regarding their right to an independent evaluation of their son, as required by 20 U.S.C. § 1415(b)(1)(A); 34 C.F.R. § 300.503; and Mass.Admin.Code tit. 603, § 328, and what independent evaluations the parents actually had obtained. We believe that the natural implication of the Does' testimony that the Town denied them notice of their right to and payment for independent evaluations is that they would expect to be reimbursed for the expenditures the law required of the Town. This inference is reasonable in view of the Massachusetts Supreme Judicial Court's decision in *Amherst-Pelham Regional School Committee v. Department of Education*, 376 Mass. 480, 381 N.E.2d 922 (1978), which validated the Department's power to order reimbursement to parents who obtained necessary services for their child because of the school committee's failure to provide them.

The hearing officer, moreover, provided an opportunity to both parties to submit rebuttal evidence as well as argument in written closing statements. At the request of both parties, the deadline was extended an additional three weeks. The Town did not utilize this evidentiary opportunity but claimed that procedural due process required that they be given an opportunity to cross-examine witnesses regarding the bills. The hearing officer found, however, and we agree, that all the submitted bills corresponded to testimony given at the hearing by witnesses examined and cross-examined by the Town. We find no authority for construing the provision "reasonable opportunity to prepare and present argument respecting the issues," Mass.Gen.Laws ch. 30A, § 11(1), to require that a *second* opportunity for cross-examination of witnesses must be provided. Nor do we construe 20 U.S.C. § 1415 to mandate such an opportunity. Rather, we think that the hearing officer provided the procedural due process required by the statute and, in any event, no prejudice has been shown. We discern no basis for a constitutional claim of denial of due process on either issue.

B. *Extent of the Hearing Officer's Consideration of Prior Years*

The hearing officer took into consideration all years of John's education because she found that the Town had provided the parents with an incomplete notice of their appeal rights in June 1977, at the close of John's first year, and no written transmission of any information about parents' rights subsequent to that time. The hearing officer therefore concluded that "the parents cannot be held responsible for any delay in requesting appeal and that the matter is legitimately before the Bureau[4]

[4]The Bureau of Special Education Appeals is a bureau within the Division of Special Education of the Department of Education of Massachusetts.

at this time." *In Re BSEA #2867* at 12 (Jan. 20, 1980). The Town challenges the consideration by the Bureau of prior years as well as the relevance of past alleged illegalities to a judgment regarding a prospective IEP. The cases on which it relies are inapposite, however. In both *New Bedford Gas and Edison Light Co. v. Board of Assessors of Dartmouth,* 368 Mass. 745, 335 N.E.2d 897, 899 (1975), and *Canron, Inc. v. Board of Assessors of Everett,* 366 Mass. 634, 322 N.E.2d 83, 85 (1975), the Supreme Judicial Court undertook to interpret Mass.Gen.Laws Ann. ch. 59, § 59, regarding the timeliness of tax abatement petitions; no rulings were made interpreting the Massachusetts Administrative Procedure Act, Mass.Gen. Laws Ann. ch. 30A, §§ 10, 11, which governed this case at the state hearings.

Moreover, the state Act, consistent with the requirements of the federal Act, expressly charges the school system with the responsibility of notifying parents of their procedural and appellate rights. *Compare* Mass.Gen.Laws Ann. ch. 71B, § 3 *with* 20 U.S.C. § 1415(b)(1)(D). *See also Scokin v. Texas,* 723 F.2d 432 (5th Cir.1984). In *Rowley,* the Court commented on the importance of the procedural safeguards in § 1415:

> When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, *see, e.g.*, §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard.

Rowley 458 U.S. at 205-6, 102 S.Ct. at 3050-1. The Court further noted that "adequate compliance with the procedures described would assure much of what Congress wished in the way of substantive content in an IEP." *Id.* Lack of notice to the parents, then, regarding their procedural rights drives a stake into the very heart of the Act.

[4] Since the Town failed to give the parents proper notice, and since such notice might have led them to appeal earlier, it was reasonable for the State to hear those appeals despite their falling outside of the specified time frame, and to view the Town's lack of notice as a waiver of any time bar objection that might otherwise apply. Here, complete procedural information should have been provided to the parents in June 1977. Although the federal Act was not yet effective on that date, the state Act's provisions were in force. The hearing officer was, therefore, empowered to take into consideration the events the parents could have appealed on that date.

The practical effect of examining the entire course of events is limited. No hearing officer or court can turn back the clock and provide a disabled child an appropriate education for prior years; prospective relief, except for reimbursement under certain circumstances, *Doe v. Brookline*, 722 F.2d at 919-21, generally comprises the remedy under the Act. *Anderson v. Thompson*, 658 F.2d 1205, 1210-13 (7th Cir.1981). The value of considering a broader period of time, therefore, is basically evidentiary, to show procedural bad faith or a history of nonimplementation of IEPs. Further, while we do not reach the question, certain prospective relief, such as compensatory education, may arguably be ordered on the basis of prior defaults in the provision of a free appropriate public education. *See Timms v. Metropolitan School District of Wabash County*, 722 F.2d 1310, 1314-15 (7th Cir.1983); *see also Milliken v. Bradley*, 433 U.S. 267, 289-90, 97 S.Ct. 2749, 2761-62, 53

L.Ed.2d 745 (1977). We conclude that interpreting the reach of the hearing officer in this manner comports with the court's responsibility to do substantial justice. *Doe v. Brookline*, 722 F.2d at 917.

C. *The Hearing Officer's Findings*

The "cooperative federalism" that has been identified as a central hallmark of the Act, *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1569 (11th Cir.1983); *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 278 (3d Cir.1980), *cert. denied*, 452 U.S. 968, 101 S.Ct. 3123, 69 L.Ed.2d 981 (1981); *see also King v. Smith*, 392 U.S. 309, 316, 88 S.Ct. 2128, 2133, 20 L.Ed.2d 1118 (1968); *Abrahamson v. Hershman*, 701 F.2d 223, 231 (1st Cir.1983), is specifically reflected in 20 U.S.C. § 1415(a). That section, as already noted, indicates that the procedures governing the "impartial due process hearing[s]," including the procedures due parties, are to be determined on the basis of state law unless more stringent federal provisions control. Here, in order to determine whether the state hearing officer was permitted to consider the Town's alleged violations of state special education regulations, we must decide whether the federal Act requires any differentiation in the choice of substantive law to be applied in state administrative hearings.

[5-7] Under the federal Act, a state is free to accept or reject the participation of the federal government in its educational programs for the disabled. *See Doe v. Brookline*, 722 F.2d at 916 n. 4. For states that contract for inclusion, the Act expressly authorizes and requires a state and local administrative apparatus to effectuate both its substantive and procedural guarantees in the first instance. *See, e.g.*, 20 U.S.C. §§ 1412-1415; 34 C.F.R. §§ 300.122, 300.128-.130, 300.220-.227, 300.300,

300.304. While compliance with the minimum standards set out by the federal Act is mandatory for the receipt of federal financial assistance, *Smith v. Cumberland*, 703 F.2d 4, 7 (1st Cir.1983), *cert. granted*, __ U.S. __, 104 S.Ct. 334, 78 L.Ed. 2d 304 (1983), the Act does not presume to impose nationally a uniform approach to the education of children with any given disability; it requires only that a "free appropriate . . . education," 20 U.S.C. § 1412(1), in conformity with the state's educational standards, 20 U.S.C. §§ 1401(18)[5], 1412(6)[6], be provided to each disabled child upon individualized evaluation and planning. *See* 20 U.S.C. § 1401(18)-(19) and *Rowley* 458 U.S. at 200-04, 102 S.Ct. at 3047-50. "Cooperative federalism" in this context, then, allows some substantive differentiation among the states in the determination of which educational theories, practices, and approaches will be utilized for educating disabled children with a given impairment. *Rowley* at 207-08, 102 S.Ct. at 3051-52.[7] This approach also permits sub-

[5] The pertinent language states: "The term 'free appropriate public education' means special education and related services which . . . (B) meet the standards of the State educational agency. . . ." 20 U.S.C. § 1401(18).

[6] The subsection provides:

> The State educational agency will be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State . . . will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

20 U.S.C. § 1412(6).

[7] The federal sufficiency of the state's substantive approach to educating disabled students with a given impairment is determined initially on the basis of the annual plan a state must submit to the federal Department of Education. Except for the review provided by § 1416(b), courts will generally determine the sufficiency of the state's substantive approach in regard to a named disabled child. Class actions to redress an alleged violation of the statute, however, have been authorized. *See Crawford v. Pittman*, 708 F.2d 1028 (5th Cir.1983); *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir.1983). *See also* 121 Cong.Rec. 37416 (Nov. 19, 1975).

stantive variations in the level of remedial educational services states provide, once the federal minimum standard of a "free appropriate public education" is met. *See* 20 U.S.C. § 1412(6). We find no indication in either the statutory language or the legislative history of the Act that Congress intended to create either a substantive or procedural ceiling regarding the rights of the disabled child. Thus, under our reading of the Act, states are free to elaborate procedural and substantive protections for the disabled child that are more stringent than those contained in the Act. *Accord Eberle v. The Board of Public Education of the School District of Pittsburgh, Pennsylvania*, 444 F.Supp. 41, 43 (W.D.Pa.1977).

[8] We believe that under the "cooperative federalism" approach the proper construction of § 1415 is that state substantive law supplements the federal Act in prescribing the determinations to be made at the due process hearing. It seems plain that the Congress drew the procedural and substantive contours of education for disabled children, but left the shading and tinting of the details largely to the states. States are responsible for filling in the numerous interstices within the federal Act through their own statutes and regulations. Congress provided for federal executive oversight through states' annual plans to assure basic compliance with the federal minimum standards but the states supply the machinery necessary to effectuate the guarantees provided by the federal Act on a daily basis.[8]

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[8] *See, e.g.*, 20 U.S.C. §§ 1412-1415; 34 C.F.R. §§ 300.126, 300.220-227, 300.300, 300.304, 300.402, 300.501. Congressional authorization for state law to supply the interstitial detail of federal statutes and regulations is not novel. Such authorization has been granted by express declaration, *see, e.g.*, 28 U.S.C. § 1346(b) (Federal Tort Claims Act specifically makes situs state law applicable to determine the government's liability) and implicitly, as by silence, *see, e.g., Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 152, 64 S.Ct. 474, 479, 88 L.Ed. 635 (1944); *Seaboard Air Line Ry. Co. v. Kenney*, 240 U.S. 489, 493-94, 36 S.Ct. 458, 459-60, 60 L Ed. 762 (1916). *See gen-*

Given the crucial role Congress has assigned to the states in effectuating a "free appropriate public education" for all disabled children, we hold that states have the right to enforce their own laws and regulations at the due process hearings authorized by § 1415,[9] and not merely those skeletal federal provisions designed as minimum standards.[10] Any other construction would render the states powerless to effectuate the federal Act fully or to provide greater protection and services for disabled children than the Act requires. We find no support in the legislative history of a congressional intention to supplant the states' historic direction of education within their boundaries.[11]

We now evaluate the Town's claim that the hearing officer deviated from the only question properly before her and allowed extraneous considerations to taint her decision that the Town's IEP was inadequate for John's needs. The hearing officer framed the issues at the outset of her opinion:

> 1. Whether the educational plan and placement proposed by Burlington . . . a 502.4 prototype,[12] is adequate and appropriate to meet [John's] special needs.

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erally Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383, 412-21 (1964); Comment, *Rules of Decision in Nondiversity Suits*, 69 Yale L.J. 1428 (1960).

[9] Those state statutes and regulations, of course, must be in compliance with the federal Act and not be invalid for some other reason, *e.g.*, as proscribed by the federal Constitution.

[10] This holding does not depart from our previous opinion in this case, which examined the role of *inconsistent* state law upon *judicial review* of a case. *See infra* at 787.

[11] Senator Stafford explained the Conference Committee bill to the Senate: "Make no mistake, educating our children is still very much a State responsibility, and this bill does not change that . . . ," 121 Cong.Rec. 37411 (Nov. 19, 1975). *See also Rowley*, 458 U.S. at 208, 102 S.Ct. at 3052.

[12] Massachusetts designates as "prototypes" its seven basic formats for special education. These range along a continuum from least restrictive, Mass.Admin. Code tit. 603, § 502.1 ("Regular education program with modifications") to § 502.4 ("substantially separate program") to § 502.7 (home and hospital programs). *See generally id.* § 500.0-508.4.

2. Whether the Burlington Public Schools have violated the procedural requirements of Chapter 766 in significant and prejudicial ways.
3. Whether, in the alternative, the Carroll School, a 766 approved private day school is the least restrictive, adequate program and placement which meets [John's] special educational needs.
4. Whether Burlington Public Schools is responsible for payment of certain evaluations.

The Town does not object to issue one, nor to the correlative inquiry contained in issue three; it concentrates its attack on issue two.[13] The hearing officer's inquiry, however, is mandated by the crucial role of state regulations in effectuating the guarantees of the federal Act. Further, the officer did not merely enumerate the state and federal regulations she found the Town to have violated, but discussed how many of those illegalities seriously compromised John's right to an appropriate education.

[9] Since there is no claim of federal preemption here, the only question remaining is whether the hearing officer properly applied state substantive law. In *Isgur* v. *School Committee of Newton*, 9 Mass.App. 290, 400 N.E.2d 1292 at 1292 (1980), the court posed the pertinent question: "[D]oes the failure to comply with the regulation[s] identified go to the essence of rights granted by c. 766 [and the federal Act]?"[14] We have no

[13] The Town also objected to issue four on the basis of lack of notice but we have found no merit in that objection. *See supra* at 780-781.

[14] The *Isgur* court posed a second inquiry for state reviewing courts, but not hearing officers, if the "essence of rights" question is answered affirmatively. It required plaintiffs also to prove that "their substantial rights have been prejudiced" by the decision of the BSEA. 400 N.E.2d at 1297. However prudent this additional inquiry may be, which we, of course, do not presume to

difficulty in finding that the hearing officer properly answered this question affirmatively. Accordingly, we hold that the hearing officer did not err in linking the Town's violations of John's essential rights to the conclusion that the Town lacked the capacity to implement the IEP as written.

II. THE SCOPE OF THE DISTRICT COURT'S REVIEW

[10] The parties present several questions regarding the scope of the district court's review of the state administrative proceedings. The Act provides in pertinent part:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(e)(2). The district court's review raises the following issues: the proper interplay between the federal and state Acts; the weight to be accorded the administrative record and the deference due the administrative findings; the construction and application of the "additional evidence" provision;

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decide, that inquiry is authorized by the state statute only where a *state agency* is alleged to have engaged in unlawful procedures that affected its decision. *See* Mass.Gen.Laws Ann. ch. 30A, § 14(7)(d). The Town is not an agency within the meaning of this statute, *see* Mass.Gen.Laws Ann. ch. 30A, § 1(2) (agency is a division of state government); *Saxon Coffee Shop, Inc. v. Boston Licensing Board*, 380 Mass. 919, 407 N.E.2d 311 (1980), and therefore this second inquiry appears to be unauthorized in the instant case. *Compare Isgur with Amherst-Pelham*, 376 Mass. 480, 381 N.E.2d 922, 937 (1978) (alleging invalidity of state BSEA decision because Bureau's decision not issued within period required by its own regulations; Supreme Judicial Court requires demonstration that delay harmed school committee's substantial rights).

and the omission of a diagnostic determination. Our resolution of these issues follows the spirit of "cooperative federalism." We must strive for an interpretation of the federal Act that does not limit the states to the federal floor, but allows them to achieve greater aspirations by higher commitments.

A. *Procedural Violations*

We first turn our attention to the district court's treatment of the state administrative finding that the Town violated numerous statutory and regulatory provisions governing procedures in special education, some federal and some state. The hearing officer found that the Town had violated, *inter alia*: the extensive regulations of both bodies of law regarding parental notification and written consent to evaluations which are, or may be, used to determine classroom placement and program; both federal and state regulations regarding the writing of an educational plan in 1977; the state regulation requiring that an evaluation team issue an educational plan or a finding of no special needs at the conclusion of an evaluation; regulations requiring that all members of an evaluation team meet together to discuss the child's educational needs, rather than in smaller groups seriatim; and the regulations mandating parental notification prior to modifications of an IEP already in force.

The district court did not take these findings into consideration. Instead, the court framed the procedural question before it as "whether the state had complied with the procedures set forth in the Act." *Town of Burlington v. Department of Education and Doe*, Memorandum of Decision at 9 (August 13, 1982). That issue, in the district court's view, required it not only to "'satisfy itself that the State has adopted the State plan, policies, and assurances required by the Act,' but also [to] determine that the State has created an IEP for the child in

question which conforms with the requirements of § 1401(19)." *Id.* (quoting *Rowley*). The district court then found that "Massachusetts has conformed with all of the Act's procedural requirements"[15] and that the "parents have been afforded the right to complain" and appeal.

[11] We believe that the district court framed the procedural inquiry too narrowly by looking only to the State's procedural compliance. Here, the Town, not the State, was alleged to have violated the Does' procedural rights. Both federal and state regulations extensively govern the responsibilities of towns or local educational agencies (LEAs) under the Act, as well as those of States. *See, e.g.*, 34 C.F.R. §§ 300.180-300.240; 300.452; 300.530-.534; Mass.Admin.Code tit. 603, §§ 200.0-211.0; 300.0-328.4. The federal statute itself places obligations upon the LEAs and designates the states as the enforcers of compliance with the federal laws. *See* 20 U.S.C. §§ 1412(6); 1414(a)(5)-(7). *See also* Senate Committee on Labor and Public Welfare Report No. 94-168, 1975 U.S.Code Cong. & Ad.News 1425, 1448 (Act designed to "assure a single line of responsibility with regard to the education of handicapped children"). The Supreme Court in *Rowley* emphasized the crucial significance of the procedural protections and enumerated some of the very provisions the state hearing officer held the Town to have violated. *See Rowley* 458 U.S. at 205, 102 S.Ct. at 3050. Finally, under the federal statute, the complaint may concern "any matter relating to the identification, evaluation, or educational placement of the child, or

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[15] This may not be entirely accurate. From our review of the federal and state Acts it appears that Massachusetts does not require its local educational agencies to follow the special procedures for evaluating specific learning disabilities the federal Act requires. *Compare* 34 C.F.R. §§ 300.540-.543 *with* Mass.Admin.Code tit. 603, §§ 300.0-339.4. *See also* Pub.L. 94-142, § 5(6), *reprinted at* 20 U.S.C. § 1411 (Note).

the provision of a free appropriate public education of such child." § 1415(b)(1)(E). This language obviously includes complaints about Town or LEA procedural violations of the Act and not merely those of the states. We, therefore, believe that the Court's directive to determine whether the "State complied with the procedures set forth in the Act," *Rowley* at 206, 102 S.Ct. at 3051, should be interpreted to open inquiry into the procedural compliance of the Town, LEA, or other agency supervised by the State where noncompliance is alleged. The district court should have expanded its review to include the Town's procedural violations.

This conclusion raises the question whether the Town can be held accountable in district court only for violations of federal law or for violations of state regulations as well. In *Burlington I*, we held that it was error for the district court to grant summary judgment on the basis of state law because "the federal specification for review, when invoked, seems to us to occupy the field over an inconsistent state provision." 655 F.2d at 431 (footnote omitted). That case dealt with the judicial review provision in section 1415(e)(2) which establishes jurisdiction over disputes in both the federal and state courts, and provides for review under a rigorous preponderance of the evidence standard. We concluded that the inconsistent state review provision, which requires a deferential "substantial evidence" standard, is inconsistent with the federal standard and therefore does not apply in suits under the federal Act. Although state law cannot provide a separate basis for relief via a pendent state claim, it would be wrong to interpret our earlier decision as holding that state law is irrelevant to resolving the federal question before the court. Because of the cooperative federalism approach and the provisions for states to supply the interstitial detail so essential for effectuating the Act, it is hardly appropriate for federal courts to enforce only the skeletal federal framework; this would greatly undermine

the provisions for substantive and procedural protection to the beneficiaries of the Act.

[12, 13] The ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time. As noted, this inquiry has both procedural and substantive components. *Rowley* at 206-07, 102 S.Ct. at 3051. We do not think the question can be answered properly unless the district court takes into consideration the federal minimum requirements and consistent state interstitial regulations. While a separate state claim for violation of state regulations will not lie, they are material and relevant to the determination of whether the federal right to a free appropriate public education has been provided under the IEP.

B. *State Substantive Standards*

The next question is whether state substantive standards which guarantee a higher level of educational quality and benefits for disabled children than the federal minimum will be given effect in federal courts. The *Rowley* Court, in interpreting the federal Act, found it "generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunities provided other children.'" *Rowley* at 198, 102 S.Ct. at 3046. But the Court also held the Act to contain a federal minimum standard, a "basic floor," of beneficial education. *Rowley* at 201, 102 S.Ct. at 3048.[16] While the Court did not articulate "one test for determining the adequacy of educational benefits conferred upon all children covered by the Act," *Rowley* at 202, 102 S.Ct. at 3049, it did identify some basic guidelines.

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[16] *See generally* Note, Handicapped Children Are Entitled to a Beneficial Education: *Board of Education v. Rowley*, 69 Iowa L.Rev. 279 (1983).

It construed the federal standard to require, *inter alia,* personalized instruction based on a determination of the unique needs of the disabled child with sufficient support services to permit the child to benefit educationally from that instruction. It also found that the plan must be "reasonably calculated to enable the [specific] child to receive educational benefits," *id.* at 207, 102 S.Ct. at 3051. It seems clear that § 1401(16), which states " 'special education' means specially designed instruction . . . to meet the unique needs of a handicapped child," and § 1401 (18), which specifies the formal requirements of a "free appropriate public education," require that all of a child's special needs must be addressed in the educational plan. The objective of the federal floor, then, is the achievement of effective results—demonstrable improvement in the educational and personal skills identified as special needs—as a consequence of implementing the proposed IEP. *See* 20 U.S.C. § 1401(19)(E). *Cf. Helms v. McDaniel,* 657 F.2d 800, 802 (5th Cir.1981); *Kruelle v. New Castle County Schools,* 642 F.2d 687, 691 (3d Cir.1981).

[14, 15] While the federal Act establishes a basic floor of education, it may provide a lesser standard of educational services and procedural protection than state law mandates.[17] *See, e.g., Cothern v. Mallory,* 565 F.Supp. 701, 706-08 (W.D. Mo.1983) (state statute requires special education to "meet the needs and maximize the capabilities" of the disabled child); *Isgur v. School Committee of Newton,* 9 Mass.App. 290, 400 N.E.2d at 1298 (state statute directs reassignment if, after subsequent evaluation, "another program may benefit the child more," and if "program does not benefit child to the maximum extent feasible"). The federal Act also specifies that a federal

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[17] Massachusetts has a highly developed special education law which predated the federal Act and has served as a model for other state statutes.

"free appropriate public education" must "meet the standards of the State educational agency," 20 U.S.C. § 1401(18)(B); *see also Rowley* 458 U.S. at 203, 102 S.Ct. at 3049. We hold, therefore, that the Act incorporates by reference state standards, be they substantive or procedural, that exceed the federal basic floor of meaningful, beneficial educational opportunity.[18] Thus a district court's inquiry must include a determination whether the state substantive standard exceeds the protection and services required by the federal Act. If it does, the state standard will operate to determine what an appropriate education requires for a particular child in a given state.[19]

Here, the district court disposed of the hearing officer's decision summarily:

> The hearing officer's decision was greatly influenced by her finding that the Town had failed to comply with "educational and procedural mandates" and her further finding of "substantive and continuing procedural irregularity." These violations of state regulations, even if they were substantial, cannot, however, affect the determination under federal law of what the "appropriate" placement was.

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[18] *See Rowley* at 192, 201, 102 S.Ct. at 3043, 3048.

[19] A state standard, however, which provides a substantive level of benefits exceeding the federal floor of opportunity may not be applied such that the federal right to an education in the least restrictive environment will be diminished. Just as the least restrictive environment guarantee, 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv); 34 C.F.R. § 300.550-.554, cannot be applied to cure an otherwise inappropriate placement, *Kruelle v. New Castle County Schools*, 642 F.2d 687, 695 (3d Cir.1981), similarly, a state standard cannot be invoked to release an educational agency from compliance with the mainstreaming provisions. *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, __ U.S. __, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983). *See also Norris v. Massachusetts Department of Education*, 529 F.Supp. 759, 767 (D. Mass.1981) (mainstreaming requirement must be construed and applied without derogating from the substantive level of education required by the Act).

This ruling ignores the requirement of § 1401(18), which specifies that a disabled child's education must "meet the standards of the State educational agency."

Application of the *Rowley* principles reveals two additional problems with the district court's decision. First, the hearing officer provided considerably more content to John's "unique needs" than the district court acknowledged in its opinion. She found that John did not work well independently, was painfully aware of his learning deficits, and had lost self-esteem because his reading skills had not allowed him to keep pace with his peers. In the Town's proposed placement, John's reading skills would have been lower than those of five of the six students and he would have been one of the older students in the class. The hearing officer was concerned that insufficient group work was possible in the class for John's needs, and that "the skill variance among students might have the effect of increasing [John's] frustration. I am additionally concerned that a highly individualized program may not be appropriate for a student who does not work well independently." In its opinion, the district court did not discuss these findings at all. Instead, the court appears to have taken as its point of reference a learning disabled child *generally* and how the Town's placement would provide a beneficial education.

[16] Nor did the district court address the hearing officer's findings that the Town exceeded the maximum thirty-six months chronological age span in the classroom proposed for John and failed to request a waiver from the department for this deficiency, and that the proposed school day was shortened by fifteen to twenty minutes without state approval. In reviewing the administrative decision, the court simply concluded that the proposed IEP complied with the "definitional checklist" of an appropriate education and met the state's educational standards. The court, in effect, ignored the state's substantive standards. This was error.

C. *The Evidentiary Issues*

Defendants contend that the district court erroneously interpreted and applied the Act's provision for "additional evidence." They also question the weight the court gave the administrative record and the deference accorded the administrative findings. Because we consider these questions interrelated, we discuss them together.

The only statutory language directly addressed to these evidentiary matters directs that "the court shall *receive the records of the administrative proceedings, shall hear additional evidence at the request of a party,* and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2) (emphasis added). This court has described the judicial review proceedings under the Act as "something short of a trial *de novo*." *Colin K. By John K. v. Schmidt,* 715 F.2d 1, 5 (1st Cir. 1983). The district court, however, which did not have the benefit either of the Supreme Court's decision in *Rowley* or of ours in *Colin K.* prior to trial, joined other courts in interpreting the Act to require a trial *de novo.* Pretrial Order at 6 (March 18, 1982). Consonant with this, it ruled that it was "bound to receive additional evidence offered by the parties, provided it is relevant." *Id.*

[17] We believe that the key to the review authorized by the Act lies in the additional evidence clause. We construe "additional" in the ordinary sense of the word, *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1980), to mean supplemental.[20] Thus construed, this clause does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony; this would be entirely

[20] We have found no legislative history to guide us on the construction to be given "additional evidence."

inconsistent with the usual meaning of "additional." We are fortified in this interpretation because it structurally assists in giving due weight to the administrative proceeding, as *Rowley* requires. *Rowley* 458 U.S. at 206, 102 S.Ct. at 3051.

[18] A trial court must make an independent ruling[21] based on the preponderance of the evidence, but the Act contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial. The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing. The starting point for determining what additional evidence should be received, however, is the record of the administrative proceeding.

We decline to adopt the rule urged by defendants that the appropriate construction is to disallow testimony from all who did, or could have, testified before the administrative hearing. We believe that, although an appropriate limit in many cases, a rigid rule to this effect would unduly limit a court's discretion and constrict its ability to form the independent judgment Congress expressly directed. A salient effect of defendants' proposed rule would be to limit expert testimony to the administrative hearing. Our review of the cases involving the Act reveals that in many instances the district court found expert testimony helpful in illuminating the nature of the controversy and relied on it in its decisional process.[22] There could be some

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[21] *See* S.Conf.Rep. No. 94-455 at 50, *reprinted in* U.S.Code Cong. & Ad.News 1975 at 1503; *Rowley* at 205, 102 S.Ct. at 3051.

[22] *See Colin K. by John K. v. Schmidt*, 536 F.Supp. 1375, 1380 (D.R.I.1982), *aff'd*, 715 F.2d 1 (1st Cir.1983); *Campbell v. Talladega City Board of Education*, 518 F.Supp. 47, 55-56 (N.D.Ala.1981); *Georgia Association of Retarded*

valid reasons for not presenting some or all expert testimony before the state agency. Experts are expensive—the parties at the state level may feel that their cases can be adequately made with less backup, especially since the administrative hearing in Massachusetts is conducted by an expert. We also recognize that in many instances experts who have testified at the administrative hearing will be bringing the court up to date on the child's progress from the time of the hearing to the trial. It would be difficult to draw a sharp line between what had or could have been testified to at the administrative hearing and the trial testimony.

[19, 20] The determination of what is "additional" evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial *de novo*. A practicable approach, we believe, is that an administrative hearing witness is rebuttably presumed to be foreclosed from testifying at trial. A motion may then be made to allow such a witness to testify within specified limits stating the justification for the testimony. In ruling on motions for witnesses to testify, a court should weigh heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources. The court should look with a critical eye on a claim, such as made here, that the credibility of a witness is a central

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Citizens v. McDaniel, 511 F.Supp. 1263, 1266-73 (N.D.Ga.1981), *aff'd*, 716 F.2d 1565 (11th Cir.1983); *Armstrong v. Kline*, 476 F.Supp. 583, 590-600 (E.D.Pa.1979), *aff'd sub nom., Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir.1980), *cert. denied*, 452 U.S. 968, 101 S.Ct. 3123, 69 L.Ed. 2d 981 (1981); *see also Abrahamson v. Hershman*, 701 F.2d 223, 226 (1st Cir. 1983); *Roncker v. Walker*, 700 F.2d 1058, 1061 (6th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983).

issue. The claim of credibility should not be an "open sesame" for additional evidence. Such an approach followed by a pre-trial order that identifies who may testify and limits the scope of the testimony will enable the court to avoid a trial *de novo*.

A further question remains: whether any special deference is to be accorded the administrative findings. The statute requires the reviewing court to "*receive the records* of the administrative proceedings," § 1415(e)(2) (emphasis added), and *Rowley* mandates that "due weight" shall be accorded to the "proceedings." No direct reference, in either the Act or *Rowley*, is made to the administrative findings. The district court's initial solution was to accord them the "*prima facie* effect of a Master's findings." The applicable rule, Fed.R.Civ.P. 53(e)(2), states: "In an action to be tried without a jury, the court shall accept the Master's findings of fact unless clearly erroneous." In view of the Act's requirement of the preponderance of the evidence standard of review, applying the clearly erroneous test to administrative findings would be contradictory and confusing. If the district court meant to place its emphasis on the *prima facie* effect to be given such findings, the result would be a plethora of motions to submit additional evidence in an attempt to overcome the *prima facie* effect of the findings and a trial *de novo* would seem inevitable. *Cf. Helms v. McDaniel*, 657 F.2d 800, 805 (5th Cir.1981) (administrative findings cannot be treated as master's findings).

[21] Because Congress intended courts to make bounded, independent decisions—bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court—the question of the weight due the administrative findings of facts must be left to the discretion of the trial court. The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence,

does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole.

[22, 23] There is a corollary to this rule. Where a state administrative decision rules a proposed IEP invalid because it has not met the state's substantive or procedural requirements pertaining to a free appropriate public education for a particular disabled child, a federal court should accord the findings deference. In such a situation, as here, a federal court continues to have the power of review on both federal and state grounds but should be more circumspect about its intrusion. It is hard to locate a significant federal interest in displacing a state agency's supportable ruling[23] that one of its school systems has not complied with state standards. In turn, where a state agency holds an IEP to have met state standards, the federal court has a continuing obligation to ensure that the state standards themselves and as applied are not below the federal minimums. This important obligation persists despite any state administrative rulings on federal law or on state recodifications of federal law.

This asymmetrical approach is based upon the principles and policy of federalism which ground the Act, and more specifically, on the pivotal role of the state—historically and as expressly recognized in the Act—in setting and enforcing the educational standards for its citizens. The local education agencies are subject to the state's legal authority, both as a general matter and per the operation of the federal Act. *See*

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[23] We do not suggest that a federal court should uphold a state agency's ruling that is contrary to established state law.

20 U.S.C. § 1431(a)(2); *see also* 20 U.S.C. § 1412(6). As already discussed, a federal minimum floor of beneficial education is provided in the Act but a state is free to exceed, both substantively and procedurally, the protection and services to be provided to its disabled children. The local educational agencies are then required to meet the state-mandated level of protection in the IEPs they propose and implement. We may conclude, then, that school systems have a set of affirmative obligations that are to be discharged under the scrutiny of state educational agencies, and only as a last resort, the federal and state courts.

This approach to IEP appeals from state educational agencies will augment states' abilities to enforce their substantive and procedural requirements regarding protection for disabled children where they exceed the federal minimum floor, and to require of local educational agencies full performance of state interstitial regulations.[24] The achievement of the federal Act's goal—free appropriate public education for disabled children—will occur primarily via state efforts. We believe this approach properly locates the federal interest at stake and limits federal intrusion into the relations between states and their political subdivisions.

[24] In this case, the district court did not follow its initial intention of giving the findings prima facie effect; nor did it give them careful consideration. It ruled the numerous findings of the state hearing officer regarding procedural and substantive violations of state law to be "irrelevant." Under the approach we have outlined, these findings by the state hearing officer must be reviewed as bearing on the federal right to an appropriate education and must receive the court's specific consid-

[24] We do not believe the Act envisions federal courts releasing school systems from their state-mandated responsibilities and allowing them to comply only with the federal minimums, as the Town argues.

eration. Further, because the hearing officer found the Town's proposed IEP invalid as a matter of state law, the district court should have circumscribed its review and accorded the state findings deference.

A final evidentiary issue remains. The Does assert as error the district court's omission of a diagnostic determination of John's disability. In its Memorandum of Decision, the district court stated: "Because the experts are in substantial agreement as to the manner in which [John] should be helped, I need not resolve the differences in their diagnoses, if indeed they are anything other than differences in emphasis." The Town endorses the district court's position. We cannot agree. The Congress indicated its concern regarding the misclassification of disabled children and ordered the establishment of special evaluation procedures. *See* 20 U.S.C. § 1412(5)(C); 34 C.F.R. §§ 300.530-.534. Even more exacting procedures were required for the evaluation of children suspected of having specific learning disabilities. *See* 20 U.S.C. § 1411 (Note); 34 C.F.R. §§ 300.540-.543.

We do not read the experts' testimony and reports as being in substantial agreement. They and other witnesses sharply disagreed over the nature of John's learning difficulties. One expert identified a severe neurologically based visual processing problem, often known as dyslexia, as the basis of John's learning problems, and noted a secondary attention deficit disorder. Another expert expressly and repeatedly excluded dyslexia as the source of John's problems and gave a diagnosis of both hyperactivity and attention deficit disorder. We recognize that the medical and educational definitions of dyslexia are in flux and that the term is being replaced in favor of more precise diagnostic terminology. *See* J. Lerner, *Learning Disabilities* 295 (1981). We also are aware that hyperactivity and specific learning disabilities flowing from visual processing problems may be present concurrently but have no necessary

conjunction. *See* S. Smith, *No Easy Answers: Teaching the Learning Disabled Child* 20 (1979). Because adequate educational remediation is dependent upon the analysis of the nature of the learning difficulties, the district court should make a finding regarding these divergent assessments of John's problems. *Cf. Colin K. v. Schmidt,* 536 F.Supp. 1375, 1387 (D. R.I.1982), *aff'd,* 715 F.2d 1 (1st Cir.1983) (district court enters a finding regarding diagnostic conflict between school system and plaintiffs).

III. SUCCEEDING YEARS—JURISDICTION AND PROOF

[25] In a pretrial order, the district court ruled that under its authority to grant appropriate relief, 20 U.S.C. § 1415(e)(2), it would hear evidence and rule upon the appropriate educational placement for the years 1980-81 and 1981-82 for which there was no IEP and therefore no state agency decision. Subsequently, *Rowley* rejected a school system's claim that a court review proceeding is moot when the challenged IEP has lapsed and IEPs for subsequent years have not been devleoped. The Court stated:

> Judicial review invariably takes more than nine months to complete, not to mention the time consumed during the preceding state administrative hearings. The District Court thus correctly ruled that it retained jurisdiction to grant relief because the alleged deficiencies in the IEP were capable of repetition as to the parties before it yet evading review.

Rowley 458 U.S. at 186-87 n. 9, 102 S.Ct. at 3040-41 n. 9 (citations omitted). Thus *Rowley* makes it clear that the status of the 1979-80 IEP is not now moot, and the court may proceed

to adjudicate its correctness and the question of who must bear the ultimate expense of John's placement in 1979-80.

It is much more difficult to determine the court's powers with respect to allocating the cost of John's schooling in 1980-81, 1981-82 and any subsequent years up to the date of the court's final decree.[25] The Town did not prepare IEPs for these years, and no appeal was lodged with the state agency. Accordingly, there were no reviewable "findings and decision," 20 U.S.C. § 1415(e)(2), before the district court for those years.

With inexplicit statutory guidance, the district court ruled that for the year 1979-80, the Town had the burden of proving by a preponderance of the evidence that the plan it formulated was appropriate for John and that the defendants Doe had the burden of proving the appropriateness of the relief they sought for years after 1979-80.[26] This allocation of the burden of proof is questioned on appeal.

[26, 27] Section 1415(e)(2) contains no provision which specifically assigns the burden of proof to a particular party in the appeal of an agency decision. As a general principle, however, in such appeals the burden of proof is on the party who seeks to overturn the findings and decision of the agency. *Mazaleski v. Treusdell*, 562 F.2d 701, 717 n. 38 (D.C.Cir. 1977). *But see Grymes v. Madden*, 672 F.2d 321, 322 (3d Cir. 1982) (EAHCA appeal). This allocation of proof is justified because it structurally assists courts in according the administrative agency's expertise the respect it is owed, an approach *Rowley* implicitly encourages. Here, the state agency ruled the Town's IEP was inadequate only for 1979-80; it made no find-

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[25] Prospective relief is not an issue in this case.

[26] In its Memorandum of Decision following the trial, the district court phrased the parents' burden somewhat differently: the parents must prove that for subsequent years the Pine Glen placement "would have been inappropriate" and held that this burden was not met.

ings or decision regarding the appropriateness of the IEP for subsequent years. Thus, neither party can be assigned the burden for later years on the basis of its posture on an appeal from a state agency decision.

The Town claims that it attempted to discharge its responsibilities for a ten-month review, Mass.Admin.Code tit. 603, § 330, but that the Does refused to make John available. It submits that such a review might have convinced the Town special education administrators that they were in error and that the Carroll School was the appropriate placement. By implication, the Town suggests that it then could have prepared revised IEPs, which it would prove appropriate in district court.

[28] The federal Act omits any reference to whether IEPs are to be revised during the pendency of review. We, therefore, must fashion a rule to facilitate implementation of the Act. We think that pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law, at least in the absence of a stipulation between the parties providing for how the outcome of the suit will affect later years. Without an IEP as a starting point, the court is faced with a mere hypothesis of what the Town would have proposed and effectuated during the subsequent years, an hypothesis which at the time of trial would have the unfair benefit of hindsight. Such a rear view proposal could not comply with the statutory requirements for drafting IEPs, could not have been submitted in a timely fashion to the parents, and cannot constitute evidence at trial. IEPs for subsequent years could be appealed to the state agency; and appeals from the state agency's "findings and decisions" on the subsequent IEPs could be consolidated with the original appeal to the district court. The continuation of the IEP process during the pendency of litigation may assist in promoting settlements. Also, subsequent IEPs that have not been appealed

to the state agency may still provide useful evidence for the district court in fashioning "appropriate" relief, *see infra*.

[29] Here, despite the Town's claim that it attempted to review and revise John's IEP in accord with his progress at the Carroll School, it failed to comply with the legal requirements for triggering such a review. The Town had the responsibility of providing the parents with appropriate notice of its intention to review John's educational placement under the provisions of 34 C.F.R. § 300.504, of scheduling and conducting the review meeting per 34 C.F.R. § 300.343 and Mass. Adm.Code tit. 603, §§ 330.0-333.3, and of determining at that meeting whether a reevaluation of John himself was desirable. The Town mistakes, therefore, the difference between the mandatory review of the child's IEP and progress, *id.* § 333.0, and the permissive reevaluation of the *child*, *id.* §§ 333.2(d) and 333.3. These are separate responsibilities. In the ten-month review, the parents and, where appropriate, the child, may attend and particcipate in the IEP review meeting. When a reevaluation of the *child* is sought, the regulation expressly states that parental consent must be obtained prior to reevaluation. *Id.* The regulations plainly prescribe that IEP review shall occur regardless of whether parents participate or whether a reevaluation of the child occurs. The Town's IEP responsibilities were therefore not excused by the parents' refusal to make John available,[27] and accordingly no advantage should accrue to the Town by dint of its failure to prepare IEPs during the subsequent years of this litigation.

[30] Despite the absence of any reviewable "findings and decision" by the state agency for subsequent years, the district

[27] This is not to say that during litigation an evaluation of the child cannot be had pursuant to Fed.R.Civ.P. 35. The record does not show that any such discovery motion was made.

court has authority with respect to those years under its power to grant appropriate relief incident to its determination concerning the contested IEP for the initial year, 1979-80. If on remand the district court finds in accordance with the BSEA holding that the Town's 1979-80 IEP was improper and that the Carroll School was then the correct placement, we believe it could order the Town also to pay for John's attendance at the Carroll School in 1980-81 and in later years up through the end of the school year in which the court's ruling is made—unless the court finds that other factual ccirccumstances not now apparent warrant a different result. In the alternative, if the district court should again uphold the Town's 1979-80 IEP, then the district court could order the Town to cease paying for the Carroll School at an appropriate time.[28]

When the district court turns to formulating appropriate relief for the subsequent years, the losing party in the dispute over the 1979-80 IEP will have the burden of producing evidence and persuading the court of changed circumstances that render the district court's determination as to the initial year inappropriate for guiding its order of relief for subsequent years.[29] The court will hear evidence regarding the subsequent years' appropriate placement from both parties prior to ordering "appropriate" relief, per § 1415(e)(2).

IV. Reimbursement

Since it is obvious that there must be a remand, it is necessary to discuss reimbursement. The factual background is essential

[28] We deal with the question of whether reimbursement would be appropriate relief in the present case, *infra*, Part IV.

[29] This allocation of burdens will not govern cases in which subsequent IEPs have been reviewed by the state agency. If a state agency reviews a subsequent IEP then, in accordance with our holding, *supra*, the party seeking to overturn that decision would bear the burden of proof.

because the claim of estoppel from reimbursement has been made by all parties.[30] In the spring of 1979, per his IEP, John was attending a regular third grade class at the Town's Memorial School, supplemented by special reading assistance of one hour daily in the school's resource room. At the IEP review meeting in May, the parents learned that John's reading skills had regressed over the year, that he was showing little progress in school generally, and that his self-esteem had plummeted. On the basis of these negative reports, the Town and parents agreed that John's educational placement at Memorial School was not beneficial and might be detrimental; the only disagreement was over the placement to which John should be moved. The Town proposed to transfer him to another school, Pine Glen, and assign him to a self-contained classroom for children with special needs; it was not a class solely or chiefly comprised on learning disabled students. On the basis of expert opinion from specialists at Massachusetts General Hospital who had evaluated John's learning and perceptual difficulties, the parents rejected the Town's proposed placement and IEP. After invoking the administrative appeals process in July, they enrolled John in the Carroll School in August. This private school, which specializes in teaching the seriously learning disabled, enrolls new students only in the fall of each school year.

The state due process hearing was held during the fall and the BSEA decision issued in late January 1980. The hearing officer determined that the Town's Pine Glen proposal was inappropriate for John and the Carroll School was the correct placement. The hearing officer ordered the Town to reimburse the Does, *inter alia*, "for costs related to the [Carroll] placement dating from the [parents'] rejection" of the Town's proposed IEP and pay for the expenses of the placement for the 1979-80 school year.

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[30] The State here, as in the other issues, supports the Does.

The Town filed an appeal in the district court on February 26, 1980, and thereafter requested a stay of the BSEA order. As of December 15, 1980, the Town had not paid any money for John's tuition or transportation expenses and the parents protested that they could no longer afford to maintain John at the Carroll School. On February 9, 1981, at a hearing in the district court, the Town agreed to pay for John's education for 1980-81 and prospectively, but refused to reimburse the Does for expenses related to the 1979-80 academic year. The district court ordered the Town to repay the Does for their outlay. This court vacated the district court's interim reimbursement order and held that interim relief could be granted only on a showing of irreparable harm, which was not made. *Burlington I*, 655 F.2d 433-34. This preliminary injunction approach was reaffirmed in *Doe v. Brookline*, 722 F.2d at 916-17.

In evaluating the parties' competing claims, we recognize four significant sets of events: first, the Does' rejection of the IEP, their initiation of the state administrative appeals process, and their placement of the child in a private school; second, the hearing officer's decision finding the Town's IEP inadequate and inappropriate; third, the commencement of the district court's jurisdiction via the Town's filing of its complaint; and fourth, the yet-to-come final decision in the case.

A. *The Parents' Transfer of John to the Carroll School*

The Town argues that we should affirm the district court's ruling in its favor on the basis of the parents' conduct in September 1979. Specifically, it urges that because John's parents enrolled him in the private Carroll School prior to the conclusion of the state administrative proceedings, they violated § 1415(e)(3), and are therefore barred from any reimbursement relief. That section provides in pertinent part:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, . . . until all such proceedings have been completed.

20 U.S.C. § 1415(e)(3). In support of its position, the Town cites two Fourth Circuit cases, *Rowe v. Henry County School Board*, 718 F.2d 115 (4th Cir.1983); *Stemple v. Board of Education*, 623 F.2d 893 (4th Cir.1980), *cert. denied*, 450 U.S. 911, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981), and one Eighth Circuit case, *Monahan v. Nebraska*, 645 F.2d 592, 598 (8th Cir.1980).[31] The State and Does argue that the child had no current educational placement and that the State and parents had "otherwise agree[d]."

We have already departed from *Stemple* and joined the Seventh Circuit in ruling that § 1415(e)(3) "establishes a strong preference, but not a statutory duty, for maintenance of the status quo." *Doe v. Brookline*, 722 F.2d at 918. We expressly reserved opinion on whether parental "self-help" constitutes a bar to a reimbursement remedy at final judgment. That question is now squarely before us, and we respectfully decline to follow the Fourth Circuit.

The rule the Fourth Circuit adumbrated in *Stemple* and *Rowe* was an interpretation of § 1415(e)(3) in opinions which did not rely on either the Act's legislative history or the structure and purposes of the Act as a whole. In *Stemple*, the court held that a statutory duty for the parents not to alter the child's educational placement arose "as soon as school authorities make identification, evaluation, and placement of a handicapped child and continues until a decision not to contest it is

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[31] This also appears to be the Ninth Circuit rule. *See Mt. View-Los Altos United High School District v. Sharron B.H.*, 709 F.2d 28 (9th Cir.1983).

reached or, if a contest ensues, until that contest is finally determined." 623 F.2d at 898. In *Brookline* we quoted the only legislative history directed to (e)(3), wherein a Conference Committee Senator explained that the Committee felt that "a placement or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus the conference adopted a flexible approach." 121 Cong.Rec. 37412 (Nov. 19, 1975). Accordingly, we concluded

> [w]e do not believe that Congress intended to freeze an arguably inappropriate program for the three to five years of review proceedings. To construe (e)(3) in this manner would thwart the express central goal of the Act: provision of a free *appropriate* education to disabled children. § 1412(1) (emphasis added).

Brookline at 918.

A number of cases have indicated Congress' prescience regarding the need for flexibility in applying the Act. Sometimes cases are brought because the parents expect too much from the school system, and the parents deem even extraordinary efforts on the part of the system insufficient for the child. *See, e.g., Rettig v. Kent City School District,* 539 F.Supp. 768 (N.D.Ohio1981), *aff'd in pertinent part, vacated in part,* 720 F.2d 463 (6th Cir.1983). By all reports, the child is in an appropriate, and indeed, an excellent placement, and there is no reason for the child to be moved during the pendency of review, or even after review. At the other extreme, as we observed in *Brookline,* there are cases in which the school system is plainly not handling the child's special education in an appropriate manner. These cases might involve a school system which refuses to complete the diagnostic and placement process authorized by the Act, *see, e.g., Quackenbush v. John-*

son City School District, 716 F.2d 141 (2d Cir.1983), *cert. denied*, __ U.S. __, 104 S.Ct. 1426, 79 L.Ed.2d 750 (1984); *Williams v. Overture*, No. 83-C-897-S (W.D.Wisc. Feb. 24, 1984); *Blazejewski v. Board of Education of Allegany*, 560 F.Supp. 701 (W.D.N.Y. 1983), or which declines to provide an appropriate private placement where a public placement is plainly lacking, *see, e.g., Parks v. Pavkovic*, 536 F.Supp. 296 (N.D.Ill.1982). In *Brookline*, we implicitly recognized in these circumstances the validity of parents making a unilateral move to fund private educational services pending review and of the parents' right to receive reimbursement at final judgment if they are held to have acted appropriately. *See Brookline* at 916; *cf. Blomstrom v. Massachusetts Department of Education*, 532 F.Supp. at 713-14 (parents to be reimbursed only for the appropriate educational services they enlisted after rejection of an inadequate IEP).

[31] We believe this approach is authorized by the Act. The Congress repeatedly enunciated as its primary goal a "free appropriate public education" for disabled children, *see, e.g.*, 20 U.S.C. §§ 1412(1), 1412(2)(B), 1415(a), 1415(b)(1)(A). We have found that § 1415(e)(3) is directory rather than mandatory, *see Brookline* at 918, and thus where there is an irreconcilable conflict between achieving the Act's primary goal and maintaining the "current educational placement," the "appropriate education" goal must prevail. We believe the Fourth Circuit's rule exalts form over substance because parents are barred from reimbursement if they change the child's placement at all prior to the termination of all proceedings, regardless of whether they rely on expert advice or a state agency decision in their favor, and even though the school system is held not to have proposed an appropriate education for the child. In *Rowe v. Henry County School Board*, No. 80-0149(D), slip op. (W.D.Va. July 15, 1982), *aff'd in pertinent part, vacated*

in part, 718 F.2d 115, the school system had not proposed an Individualized Educational Program for a child with severe learning disabilities and offered only vague generalizations regarding the education of disabled children. The district court found that the school system had "wholly failed to demonstrate that it can provide an appropriate free education" to the child, *id.* at 4, and pointed out that the county's five high schools were serviced by only one certified learning disability instructor. The court concluded that the child did not have a few years to wait for the learning disability program the system hoped to develop. *Id.* at 6. Although the *Rowe* parents had obtained specialized learning disability instruction for the child in the face of plainly inadequate services offered by the school system, the Fourth Circuit barred them from any reimbursement relief. *See Rowe v. Henry County*, 718 F.2d at 116.

The effect of such a rule is that a child must remain in an arguably inappropriate placement until a district court properly has jurisdiction and can issue a preliminary injunction.[32] Not only is this rule contrary to the explicit legislative history of the (e)(3) provision, but treats these special needs children as though they were nonperishable commodities able to be warehoused until the termination of in rem proceedings. Current research indicates that full development of reading and other skills will more likely occur with learning disabled children, like the child at issue here, if adequate remedial services are provided in the early primary grades. Later intervention generally appears to require special services over a longer period of time to achieve a similar rate of remediation. Some skills must be learned early in the brain's maturation process for them to be learned well, or in some cases, at all. Delay in remedial teaching is therefore likely to be highly injurious to

[32] The matter would not reach court until all the administrative appeal procedures had been exhausted, which, in Massachusetts, might take as long as one year.

such children. *See* 121 Cong.Rec. 37412, 37416 (Nov. 19, 1975).

In *Brookline* we concluded that

> permitting reimbursement promotes the purpose and policy of the Act. If the parents are incorrect in their claim that the IEP provides an inappropriate education for their child, they, like any other parents, should bear the financial burden of giving their child a private education. If the school committee's proposed public placement is held inappropriate, then through reimbursement all parties are restored to the position the Act sought to achieve. In turn, "[f]or the successful parent to be left with what should have been the town's bill ab initio does not seem a municipal protection Congress would have intended, however great the shortage of funds."

Brookline at 921 (footnote and citation omitted). Permitting reimbursement allows the child to receive the education thought to be appropriate by his or her parents, the party normally vested with the power to make such decisions. Barring reimbursement or forbidding transfer would compromise this parental right, a right sought to be encouraged by the Act. But, as we held in *Brookline*, reimbursement will not be available to parents if it turns out that the school system had proposed and had the capacity to implement an appropriate IEP. This financial risk is a sufficient deterrent to a hasty or ill-considered transfer; a complete bar to reimbursement should not be imposed on the parents for acting unilaterally.

[32] Some courts have made a distinction between a unilateral parental transfer made after consultation with the school system, yet still an action without the system's agreement, and transfers made truly unilaterally, bereft of any attempt to

achieve a negotiated compromise and agreement on a private placement. *See, e.g., Blomstrom v. Massachusetts Department of Education*, 532 F.Supp. at 713. We believe this to be a reasonable distinction, one which may be taken into account in a district court's computation of an award of equitable reimbursement. The Act envisions a cooperative IEP process and prefers a change in placement of a child to occur as a result of agreements between parties. *See* § 1415(e)(3).

The Does and the State also argue that they "otherwise agree[d]" within the meaning of the statute, § 1415(e)(3), and their agreement retroactively cured any taint of a unilateral parental transfer. The agreement the defendants point to is the BSEA decision in accord with the parents' choice of the Carroll School. We need not rule on this claim, however, because we do not find either a statutory duty for the child to remain in one placement for the pendency of all proceedings, or that a parental move after an attempted negotiated settlement with the school system constitutes "unclean hands."

Even were we to utilize the parties' approach that the child was moved from the "current placement" per § 1415(e)(3), we could not reach the Town's conclusion that such action contravened the Act. The Town and parents agreed that the current placement was inappropriate; they only disagreed as to which school and program the child should be moved. We cannot in good faith condemn the parents for moving the child from the "current placement" all parties had agreed to be insufficient. As we have emphasized, Congress valued consistency in a disabled child's education, but not foolish consistency.[33]

To summarize, we do not agree that a unilateral parental move constitutes a bar to reimbursement of the parents if their actions are held to be appropriate at final judgment. Reimburse-

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[33] "A foolish consistency is the hobgoblin of little minds adored by little statesmen and philosophers and divines."—Ralph Waldo Emerson

ment must be denied to the parents if the school system proposed and had the capacity to implement an appropriate IEP. Because the Act envisions cooperatively discussed and negotiated IEPs and placements, whether parents made a specific proposal for a private placement and attempted in good faith to gain an agreement with the school system before moving the child may be taken into account as a factor in determining the amount of reimbursement.

B. *The Parents' Right to Rely on the State Administrative Decision*

The State and Does argue that where the parents have relied on a final state administrative decision in their favor, a town or local educational agency should be estopped from obtaining retrospective reimbursement even though it prevails at final judgment. The Town maintains it is entitled to recover all monies it expended for John's education at the private school, should it prevail.

This court has affirmed the availability of equitable reimbursement to a prevailing party as a general matter in *Doe v. Brookline*, 722 F.2d at 919-21.[34] The posture of that case, however, was markedly different from this one. In *Brookline*, the state hearing officer ruled that the Town's proposed IEP, under which it planned to transfer the child from the private school he had been attending for two years at public expense, and reenroll him in a public school with special services, was adequate and appropriate. The parents then rejected the BSEA's decision and appealed to federal court. By contrast, here the parents maintained John in the Carroll School consistent with a state agency order in their favor. It was the Town that brought suit to reverse the State agency decision.

[34] We applied the *Brookline* approach to reimbursement in *Doe v. Anrig*, 728 F.2d 30 (1st Cir.1984) (second appeal) (*Doe v. Anrig II*).

The Does argue that unless parents are of considerable means, few will be able or willing to implement a state agency decision in their favor if they stand liable to reimburse a town or local school system at final judgment. Cognizant of other situations, the State points out that where a state agency orders a town to fund a private placement, after ruling against a town's IEP, parents will be placed in the difficult position of having to choose between the state directive to maintain the child in the private placement at the risk of ultimately using their own funds, or of moving the child to the town's placement which the state agency has determined to be inadequate. Choosing the latter option would contravene the express congressional policy of consistency and adequacy in a disabled child's education during an IEP contest; should the judicial decision uphold the State and parents, the child will have spent two and possibly three years in an inappropriate school. In sum, the State and Does argue that in order for the Act to provide appropriate education for disabled children from wealthy and poor families alike, parents must be entitled to rely on a state administrative decision in their favor, and not be put at risk for reimbursement by a judicial judgment which reverses that decision.

Considering the Act as a whole and the interests it seeks both to protect and to further, we conclude that appellants' contentions must be sustained in part in the present case. Retroactive reimbursement by parents is not "appropriate" relief within the meaning of § 1415(e)(2) where they relied on and implemented a state administrative decision in their favor ordering a particular placement. We emphasize again that our interpretation is guided by the cooperative federalism *Rowley* elaborated. The states are the chief arms of the federal Act's enforcement; their decisions should not be disregarded because of potential parental financial liability. Implementation of a state agency's determination of the appropriate education for a

disabled child should not be delayed until the statute of limitations on an appeal has run or until a final judicial decision has been rendered where an appeal has been taken. Congress, through the principal author of the Act, has spoken unequivocally in this regard: "I cannot emphasize enough that delay in resolving matters regarding the educational program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development." 121 Cong.Rec. 37416 (Nov. 19, 1975) (remarks of Sen. Williams, explaining Conference Committee bill to the Senate).

Cooperative federalism also requires the federal courts to accommodate state laws and regulations that place greater duties on towns than those imposed by the federal Act, *see supra,* Part II. The governing Massachusetts regulations require that "whenever a placement is . . . ordered [by the state agency] . . . such placement shall be made forthwith, without any unnecessary delay." Mass.Admin.Code tit. 603, § 409.0. Further, "[n]o parents shall be required to bear any part of the cost of the instruction and support actually rendered or furnished to their child by a private school in which such child is placed pursuant . . . to an order under Chapter 4 [by the state agency]." Mass.Admin.Code tit. 603, § 504.5(e). Thus the State's procedures contemplate immediate implementation of the state agency's orders without risk of reimbursement on the part of parents. We think such an arrangement does not contravene the federal Act, and is a question of state-town relations in which the federal courts need not interfere.

[33, 34] We hold, therefore, that where the final state administrative decision rules a town's proposed IEP inappropriate and orders the town to fund placement, and the parents have complied with and implemented that decision, a town or local

educational agency is estopped from obtaining reimbursement for the time period, usually one year, covered by the state agency decision and order. Here, however, the parents could not have relied on a state agency decision until January 1980, the middle of John's first year at the Carroll School. Although the enrollment of John in the Carroll School in August may have been a wise course of action, the parents had no basis for relying on a decision that had not yet been made. Accordingly, should the Town again prevail on remand, the parents can claim a "safe-harbor" estoppel from reimbursement only for that portion of the school year subsequent to the BSEA decision.[35]

We cannot, however, endorse the defendants' proposed rule that the Town automatically be estopped from obtaining reimbursement for any and all expenditures during the entire period encompassed by judicial review proceedings. Their view is that parents are entitled to rely on the last state agency decision throughout the case, not just for the one year to which the decision was addressed, regardless of which party prevails. This smacks more of a penalty against the Town for bringing suit as an "aggrieved party," § 1415(e)(2), than appropriate equitable estoppel. Moreover, the congressional policies of cooperative federalism and minimal delay in implementation of a state agency decision are not served where no applicable state agency decision exists. Because, in addition, we recognize that the needs of disabled children change over time, *Brookline*, 722 F.2d at 918, we hold that parents do not have

[35] A safe-harbor is justifiably available to parents after a final state agency order, as opposed to a court-ordered preliminary injunction, *see Brookline*, 722 F.2d at 921 n. 10, because under our cooperative federalism approach a state agency should be free to order a local educational agency to provide nonreimbursable interim relief pursuant to state authority over its subdivisions without interference by the federal courts. On the contrary, when parents seek preliminary injunctive relief from a federal court, they must accept such relief under the risk of repayment should they ultimately lose on the merits.

an absolute right to rely on a state order subsequent to the time period for which it was issued.[36] To be sure, in the present case the State ordered the Town to continue funding the Carroll School placement after 1979-80, despite the lack of IEPs or state substantive reviews for those years. Because of the unusual posture of this case, we think the relevance of this state action on behalf of the Does to the question of reimbursement for the years after 1979-80 is properly left for the district court to resolve in accord with the concerns we have expressed, *supra*.

[35] The relation of *Brookline* to our rulings on reimbursement here should be made explicit. In *Brookline*, we recognized the *availability* of reimbursement to a prevailing party, 722 F.2d at 921; *see also Doe v. Anrig II*, 728 F.2d 30 at 31 but did not hold that reimbursement was *automatically* to be awarded as a result of prevailing on the merits. We viewed it then, as now, to be a matter of equitable relief, committed to the sound discretion of the district court. In *Brookline*, as noted *infra*, we found that serious procedural errors could foreclose the availability of reimbursement to a town. In the instant case, we hold additionally that parental reliance on a state order of relief forecloses the availability of reimbursement for the period of reliance and requires that where parents have paid the bill for the period, they must be reimbursed.

We conclude this section by stating what we hope is by now obvious in situations where reimbursement is an issue; whether to order reimbursement, and at what amount, is a question determined by balancing the equities. Factors that should be

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[36] In future cases we envision that towns will continue to prepare IEPs for subsequent years and that parents will seek state review of those IEPs, *see supra*. If the state agency finds for the parents in subsequent years and orders continuing nonreimbursable relief, then a safe-harbor from reimbursement would also arise under those subsequent decisions and orders.

taken into account include the parties' compliance or non-compliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters.

C. *Bad Faith as a Bar to Reimbursement*

[36] The State and Does argue that the range, frequency, and gravity of the Town's procedural violations amount to "bad faith" as adumbrated by Judge Swygert in *Anderson v. Thompson*, 658 F.2d at 1214, and therefore should bar reimbursement to the Town by the parents. We applied the Seventh Circuit's reasoning in *Doe v. Brookline*, 722 F.2d at 921, where we held that "serious procedural errors are grounds for denial of reimbursement." If the district court finds that the procedural violations were serious, and thus constitute bad faith, then reimbursement can be denied the Town.

D. *Other Reimbursement Issues*

[37] The final question on reimbursement for tuition and related services is the appropriate method of calculating the measure of reimbursement if the Town prevails. We do not accept the defendants' argument that the parents are entitled to offset the Town's average cost per student. We agree with the offset made by the district court following Judge Aldrich's ruling that the parents had the burden of showing "the town's actual savings, such as marginal costs it would have incurred in any case, and the funds received from the state for [John's] education." *Doe v. Anrig*, 561 F.Supp. at 130.

The issue of reimbursement for medical and other evaluations of John is not dependent upon who prevails, as the district court rightly observed. Defendants' contention that the district court erroneously left some of these costs to be borne by the parents cannot be sustained. We affirm the district court's decision on this issue.

V. CONCLUSION

We are fully aware of the time and effort that has gone into this case by two very able judges as well as the attorneys and parties, but a remand is necessary. This is, to put it mildly, a difficult Act to interpret and effectuate. Congress has combined elements of a number of different statutory schemes and visited on the judiciary the task of making them mesh. We have done our best to follow the intent and purpose of the Act to ensure "a free appropriate public education" for all handicapped children, but the path has not been easy.

Summary

On remand, the district court must review the state administrative proceedings in accord with the standards set forth herein giving due consideration to the Town's procedural violations and the state's substantive standards.

In determining whether additional evidence should be received, the court starts with the record of the administrative proceedings. From there on, the question of the admission of evidence is for the discretion of the district court within the guidelines set forth.

The district court must give the state administrative findings careful consideration bearing in mind that the state agency's decision that the Town did not meet the state's substantive and procedural requirements is entitled to deference.

The district court must make a finding as to the nature of the child's learning disabilities in order to evaluate properly the IEP.

The burden of proof as to subsequent years falls on the losing party in the dispute over the 1979-80 IEP.

Once the district court reaches its decision, it may order reimbursement in accordance with the principles discussed in section IV, *supra*.

Reversed in part. Affirmed in part. Remanded for further proceedings consistent herewith.

Costs awarded in favor of defendants-appellants.

APPENDIX

§ 1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to—

> (A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;
>
> (B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved

in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency

or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection

(c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

United States Court of Appeals for the First Circuit

No. 83-1424

TOWN OF BURLINGTON, ET AL.,
Plaintiffs, Appellees,
v.
DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants, Appellants.

No. 83-1425

TOWN OF BURLINGTON, ET AL.,
Plaintiffs, Appellees,
v.
DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS,
Defendant, Appellee,

JOHN DOE, ETC.,
Defendant, Appellant.

No. 83-1426

TOWN OF BURLINGTON, ET AL.,
Plaintiffs, Appellants,
v.
DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants, Appellees.

JUDGMENT
Entered: May 29, 1984

These causes came on to be heard on appeal from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is reversed in part, affirmed in part and the cause is remanded to the district court for further proceedings consistent with the opinion filed this day.

Costs to appellants.

By the Court:

/s/_____
Francis P. Scigliano
Clerk.

[cc: Messrs: Rosenberg, Berman and Ms. Janos]

United States Court of Appeals for the First Circuit

No. 83-1424

TOWN OF BURLINGTON, ET AL.,
PLAINTIFFS, APPELLEES,
v.
DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
DEFENDANTS, APPELLANTS.

No. 83-1425

TOWN OF BURLINGTON, ET AL.,
PLAINTIFFS, APPELLEES,
v.
DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT, APPELLEE.

No. 83-1426

TOWN OF BURLINGTON, ET AL.,
PLAINTIFFS, APPELLANTS,
v.
DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
DEFENDANTS, APPELLEES.

Before CAMPBELL, *Chief Judge*,
SWYGERT,* *Senior Circuit Judge*,
and BOWNES, *Circuit Judge*.

ORDER OF COURT

Entered June 29, 1984

The motion for rehearing and rehearing en banc is denied. The following remarks respond *seriatim* to plaintiff's petition.

* Of the Seventh Circuit, sitting by designation.

I. Plaintiff perceives a dilution of the federal least restrictive environment guarantee if state law is enforced per the opinion. This guarantee, however, in contradistinction to the veiled premise of plaintiff's argument, must be applied "without derogating from the substantive level of education required by the Act." *See* slip op. at 29, n.19. Admittedly, a tension may exist between 20 U.S.C. § 1401(18) and §§ 1412(5)(B), 1414 (a)(1)(C)(iv), but accommodation of both congressional directives is the court's express goal.

II. Contrary to petitioner's assertion, the Town's procedural violations were discussed pervasively in the administrative hearing. *See, e.g.*, A. III, pp. 15, 21, 24, 45, 361, 364, 378. That plaintiff chose to argue only one procedural violation in its final administrative hearing brief despite the repeated charges at the hearing does not change the fact that it had actual notice of the procedural charges. This court declines to rescue the plaintiff from its stance of stubborn indifference to and deprecation of its violations of John's procedural rights.

III. Plaintiff placed this issue in contention. *See* Town's Brief at 19 (submitted to this court Nov. 1983).

IV. The district court concluded as *a matter of law*, that, regardless whether the violations of state law were substantial or trivial, they were irrelevant to her decision under the federal Act. Plaintiff's statement, "When in the present case, the District Court Judge concluded that the past violations were irrelevant, she did so on the basis of uncontroverted evidence. . . ," is a patent misrepresentation. *Compare* Pet. for Rehearing at 14 *with* slip op. at 29 and quote therein. The Town can, however, on remand press its view that its violations of state law were insubstantial.

V. We do not believe that plaintiff's proposed rule, which was announced but not followed by the district court, is appropriate. A *de novo* trial, which plaintiff's rule would sponsor, is proscribed.

On page 34 of the slip opinion, line 1, the sentence should read: "In ruling on motions for witnesses to testify, a court should weigh . . . ."

VI.-IX. The opinion speaks for itself.

X. Plaintiff apparently has not read the opinion carefully. *See* slip op. at 60-61 (parents may offset "the Town's actual savings . . . and the funds received from the state . . .").

By the Court:

/s/ Francis P. Scigliano
Clerk.

CORRECTED COPY

Supreme Court, U.S.
FILED
SEP 18 1984
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-433.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,

v.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO A/K/A JOHN DOE, SR., AS HE IS NEXT FRIEND OF MICHAEL PANICO A/K/A JOHN DOE, JR.,
RESPONDENTS.

Statutory Appendix.

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CONSTITUTION OF THE UNITED STATES.

ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

. . . . . .

UNITED STATES STATUTES.

UNITED STATES CODE, TITLE 20.

CHAPTER 33 — EDUCATION OF HANDICAPPED
SUBCHAPTER I — GENERAL PROVISIONS

§ 1401. Definitions

As used in this chapter—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually hand-

icapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) Omitted

(3) The term "Advisory Committee" means the National Advisory Committee on Handicapped Children.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands and the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which—

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Secretary pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: *Provided, however,* That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semi-professional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Secretary determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, he shall appoint as an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Secretary shall publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of education or training offered.

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends

and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been

provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I [20 U.S.C. 2701 et seq.] or title VII [20 U.S.C. 3221 et seq.] of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act [20 U.S.C. 3223(a)(2)].

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

. . . . . .

SUBCHAPTER II — ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

§ 1411. Entitlements and Allocations

(a) Formula for determining maximum State entitlement

(1) Except as provided in paragraph (3) and in section 1419 of this title, the maximum amount of the grant to which a State is entitled under this subchapter for any fiscal year shall be equal to—

(A) the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services;

multiplied by—

(B)(i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this subchapter for the fiscal year ending September 30, 1977.

(2) For the purpose of this subsection and subsection (b) through subsection (e) of this section, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to number of such children receiving special education and related services on December 1 of the fiscal year preceding the fiscal year for which the determination is made.

(4) For purposes of paragraph (1)(B), the term "average per pupil expenditure", in the United States, means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source

of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year.

(5)(A) In determining the allotment of each State under paragraph (1), the Secretary may not count—

(i) handicapped children in such State under paragraph (1)(A) to the extent the number of such children is greater than 12 per centum of the number of all children aged five to seventeen, inclusive, in such State; and

(ii) handicapped children who are counted under section 241c-1 of this title.

(B) For purposes of subparagraph (A), the number of children aged five to seventeen, inclusive, in any State shall be determined by the Secretary on the basis of the most recent satisfactory data available to him.

(b) Distribution and use of grant funds by States for fiscal year ending September 30, 1978

(1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1978—

(A) 50 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) 50 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such State, for use in accordance with the priorities established under section 1412(3) of this title.

(2) Of the funds which any State may use under paragraph (1)(A)—

(A) an amount which is equal to the greater of—

(i) 5 per centum of the total amount of funds received under this subchapter by such State; or

(ii) $200,000;

may be used by such State for administrative costs related to carrying out sections 1412 and 1413 of this title;

(B) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 1412(3) of this title.

(c) Distribution and use of grant funds by States for fiscal years ending September 30, 1979, and thereafter

(1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter—

(A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) except as provided in paragraph (3), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such State, for use in accordance with priorities established under section 1412(3) of this title.

(2)(A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1)(A)—

(i) an amount which is equal to the greater of—

(I) 5 per centum of the total amount of funds received under this subchapter by such State; or

(II) $300,000;

may be used by such State for administrative costs related to carrying out the provisions of sections 1412 and 1413 of this title; and

(ii) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 1412(3) of this title.

(B) The amount expended by any State from the funds available to such State under paragraph (1)(A) in any fiscal year for the provisions of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

(3) The provisions of section 1413(a)(9) of this title shall not apply with respect to amounts available for use by any State under paragraph (2).

(4)(A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if—

(i) such local educational agency or intermediate educational unit is entitled, under subsection (d) of this section, to less than $7,500 for such fiscal year; or

(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 1414 of this title.

(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of

a free appropriate education to handicapped children residing in the area served by such local educational agency or such intermediate educational unit. The provisions of paragraph (2)(B) shall not apply to the use of such funds.

(d) Allocation of funds within States to local educational agencies and intermediate educational units

From the total amount of funds available to local educational agencies and intermediate educational units in any State under subsection (b)(1)(B) or subsection (c)(1)(B) of this section, as the case may be, each local educational agency or intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b)(1)(B) or subsection (c)(1)(B) of this section, as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this subchapter.

(e) Territories and possessions

(1) The jurisdictions to which this subsection applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(2) Each jurisdiction to which this subsection applies shall be entitled to a grant for the purpose set forth in section 1400(c) of this title in an amount equal to an amount determined by the Secretary in accordance with criteria based on respective

needs, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate of the amounts available to all States under this subchapter for that fiscal year. If the aggregate of the amounts, determined by the Secretary pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per centum limitation, the entitlement of each such jurisdiction shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation.

(3) The amount expended for administration by each jurisdiction under this subsection shall not exceed 5 per centum of the amount allotted to such jurisdiction for any fiscal year, or $35,000, whichever is greater.

(f) Indian reservations

(1) The Secretary is authorized to make payments to the Secretary of the Interior according to the need for such assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior. The amount of such payment for any fiscal year shall not exceed 1 per centum of the aggregate amounts available to all States under this subchapter for that fiscal year.

(2) The Secretary of the Interior may receive an allotment under this subsection only after submitting to the Secretary an application which meets the applicable requirements of section 1414(a) of this title and which is approved by the Secretary. The provisions of section 1416 of this title shall apply to any such application.

(g) Reductions or increases

(1) If the sums appropriated for any fiscal year for making payments to States under this subchapter are not sufficient to pay in full the total amounts which all States are entitled to receive under this subchapter for such fiscal year, the maximum amounts which all States are entitled to receive under this subchapter for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit, under the provisions of subsection (d) of this section, which it estimates that it will expend in accordance with the provisions of this subchapter. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this subchapter, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies or intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

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§ 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure

that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

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§ 1414. Application

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including—

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with re-

spect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that (A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter (i) shall be used to pay only the excess costs directly attributed to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas

which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this subchapter;

(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs carried out under this subchapter; and

(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

(b) Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Secretary under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall—

(i) make no further payments to such local educational agency or such intermediate educational unit under sec-

tion 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

(c) Consolidated applications

(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local

educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of the subchapter.

(e) Reallocation of funds

Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

(f) Programs using State or local funds

Notwithstanding the provisions of subsection (a)(2)(B)(ii) of this section, any local educational agency which is required

to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

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§ 1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to—

> (A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

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§ 1416. Withholding of payments

(a) Failure to comply with this subchapter; limitations; public notice

Whenever the Secretary, after reasonable notice and opportunity for hearing to the State educational agency involved

(and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds—

(1) that there has been a failure to comply substantially with any provision of section 1412 or section 1413 of this title, or

(2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the application of a local educational agency or intermediate educational unit aproved by the State educational agency pursuant to the State plan,

the Secretary (A) shall, after notifying the State educational agency, withhold any further payments to the State under this subchapter, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. If the Secretary withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this subchapter to specified local educational agencies or intermediate educational units affected by the failure. Until the Secretary is satisfied that there is no longer any failure to comply with the provisions of this subchapter, as specified in clause (1) or clause (2), no further payments shall be made to the State under this subchapter or under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational

agency under this subchapter shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

(b) Judicial review

(1) If any State is dissatisfied with the Secretary's final action with respect to its State plan submitted under section 1413 of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(2) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or to set aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

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FEDERAL REGULATIONS.

34 Code of Federal Regulations.

§ 300.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under § 300.122.

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§ 300.126 Full educational opportunity goal — facilities, personnel, and services.

(a) *General requirement.* Each annual program plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all handicapped children. The State educational agency shall include the data required under paragraph (b) of this section and whatever additional data are necessary to meet the requirement.

(b) *Statistical description.* Each annual program plan must include the following data:

(1) The number of additional special class teachers, resource room teachers, and intinerant or consultant teachers needed for each disability category and the number of each of these who are currently employed in the State.

(2) The number of other additional personnel needed, and the number currently employed in the State, including school psychologists, school social workers, occupational therapists, physical therapists, home-hospital teachers, speech-language pathologists, audiologists, teacher aides, vocational education

teachers, work study coordinators, physical education teachers, therapeutic recreation specialists, diagnostic personnel, supervisors, and other instructional and noninstructional staff.

(3) The total number of personnel reported under paragraphs (b) (1) and (2) of this section, and the salary costs of those personnel.

(4) The number and kind of facilities needed for handicapped children and the number and kind currently in use in the State, including regular classes serving handicapped children, self-contained classes on a regular school campus, resource rooms, private special education day schools, public special education day schools, private special education residential schools, public special education residential schools, hospital programs, occupational therapy facilities, physical therapy facilities, public sheltered workshops, private sheltered workshops, and other types of facilities.

(5) The total number of transportation units needed for handicapped children, the number of transportation units designed for handicapped children which are in use in the State, and the number of handicapped children who use these units to benefit from special education.

(c) *Data categories*. The data required under paragraph (b) of this section must be provided as follows:

(1) Estimates for serving all handicapped children who require special education and related services.

(2) Current year data, based on the actual numbers of handicapped children receiving special education and related services (as reported under Subpart G), and

(3) Estimates for the next school year.

(d) *Rationale*. Each annual program plan must include a description of the means used to determine the number and salary costs of personnel.

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§ 300.128 Identification, location, and evaluation of handicapped children.

(a) *General requirement.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken to insure that:

(1) All children who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each annual program plan must:

(1) Designate the State agency (if other than the State educational agency) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation;

(3) Describe the extent to which:

(i) The activities described in paragraph (a) of this section have been achieved under the current annual program plan, and

(ii) The resources named for these activities in that plan have been used;

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes;

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to insure that the State educational agency obtains:

(i) The number of handicapped children within each disability category that have been identified, located, and evaluated, and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

§ 300.129 Confidentiality of personally identifiable information.

(a) Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Secretary shall use the criteria in §§ 300.560-300.576 of Subpart E to evaluate the policies and procedures of the State under paragraph (a) of this section.

§ 300.130 Individualized education programs.

(a) Each annual program plan must include information which shows that each public agency in the State maintains records of the individualized education program for each handicapped child, and each public agency establishes, reviews, and revises each program as provided in Subpart C.

(b) Each annual program plan must include:

(1) A copy of each State statute, policy, and standard that regulates the manner in which individualized education programs are developed, implemented, reviewed, and revised, and

(2) The procedures which the State educational agency follows in monitoring and evaluating those programs.

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FREE APPROPRIATE PUBLIC EDUCATION

§ 300.300 Timeliness for free appropriate public education.

(a) *General.* Each State shall insure that free appropriate public education is available to all handicapped children aged three through eighteen within the State not later than September 1, 1978, and to all handicapped children aged three through twenty-one within the State not later than September 1, 1980

(b) *Age ranges 3-5 and 18-21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to handicapped children aged three, four, five, eighteen, nineteen, twenty, and twenty-one:

(1) If State law or a court order requires the State to provide education for handicapped children in any disability category in any of these age groups, the State must make a free appropriate public education available to all handicapped children of the same age who have that disability.

(2) If a public agency provides education to non-handicapped children in any of these age groups, it must make a free appropriate public education available to at least a proportionate number of handicapped children of the same age.

(3) If a public agency provides education to 50 percent or more of its handicapped children in any disability category in any of these age groups, it must make a free appropriate public education available to all of its handicapped children of the same age who have that disability.

(4) If a public agency provides education to a handicapped child in any of these age groups, it must make a free appropriate public education available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make a free appropriate public education available to a handicapped child in one of these age groups if:

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to nonhandicapped children in that age group; or

(ii) The requirement is inconsistent with a court order which governs the provision of free public education to handicapped children in that State.

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§ 300.304 Full educational opportunity goal.

(a) Each State educational agency shall insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children in the area served by the public agency.

(b) Subject to the priority requirements under §§ 300.320-300.324, a State or local educational agency may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

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§ 300.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977-1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this action, a

meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review*. Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

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§ 300.347 Private school placements.

(a) *Developing individualized education programs*. (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs*. (1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility*. Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

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§ 300.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 300.450-300.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 300.500-300.514 of Subpart E.

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§ 300.452 Local educational agency responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

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§ 300.501 General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of §§ 300.500-300.514.

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§ 300.503 Independent educational evaluation.

(a) *General.* (1) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insurers that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.301 of Subpart C.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under § 300.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

§ 300.504 Prior notice; parent consent.

(a) *Notice.* Written notice which meets the requirements under § 300.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2) (i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the

hearing procedures in §§ 300.506-300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 300.510-300.513.

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PROTECTION IN EVALUATION PROCEDURES

§ 300.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 300.530-300.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

§ 300.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 300.532.

§ 300.532 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

§ 300.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in §§ 300.550-300.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with §§ 300.340-300.349 of Subpart C.

§ 300.534 Reevaluation.

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with §§ 300.340-300.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under § 300.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

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ADDITIONAL PROCEDURES FOR EVALUATING SPECIFIC LEARNING DISABILITIES

§ 300.540 Additional team members.

In evaluating a child suspected of having a specific learning disability, in addition to the requirements of § 300.532, each public agency shall include on the multidisciplinary evaluation team:

(a) (1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the State educational agency to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

§ 300.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if:

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child' age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

(i) Oral expression;

(ii) Listening comprehension;

(iii) Written expression;

(iv) Basic reading skill;

(v) Reading comprehension;

(vi) Mathematics calculation; or

(vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of:

(1) A visual, hearing, or motor handicap;

(2) Mental retardation;

(3) Emotional disturbance; or

(4) Environmental, cultural or economic disadvantage.

§ 300.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

§ 300.543 Written report.

(a) The team shall prepare a written report of the results of the evaluation.

(b) The report must include a statement of:

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability which is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

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Least Restrictive Environment

§ 300.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 300.550-300.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature of severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

§ 300.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 300.13 of Subpart A (instruction in regular classes special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

§ 300.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement: (1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements, included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

§ 300.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.306 of Subpart C, each public agency shall insure that each handicapped child participates with nonhandicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

§ 300.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that § 300.550 is effectively implemented.

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Federal Rules of Appellate Procedure.

RULE 3.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order, or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

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STATE STATUTES.

MASSACHUSETTS GENERAL LAWS.

Chapter 71B.

Children with Special Needs.

§ 10. Referral by Department of Children to Any Institution Within or Without Commonwealth; Expenses of Instruction and Support.

The department may, on an annual renewal basis, upon the request of the parents or guardians and the recommendations of a local school committee and a regional branch of the division of special education, and with the approval of the secretary of educational affairs refer children requiring special education to any institution within or without the commonwealth which offers curriculum, instruction and facilities which are appropriate to the child's needs and which are approved by the department under regulations prescribed by the departments of education, mental health and public health. The curriculum at such an institution must for approval be equivalent, insofar as the department deems feasible, to the curriculum for children of comparable age and ability in the public schools of the commonwealth.

Before acting on said request the department shall determine the nature and extent of a child's special needs, shall require the local school committee and regional advisory council to prepare and submit plans detailing the time needed to establish facilities adequate for children with special needs in the city, town or school district where the child resides, and shall ascertain whether adequate facilities and instruction programs are available or when adequate facilities can be made available in the city, town or school district where the child with special needs resides. Until adequate facilities can be made available, such child shall be placed in the most adequate program available as determined by the department. The department shall further define by regulation the circumstances in which it shall be directly responsible for the placement of children in such special education programs, and by standards available to the public determine the methods and order of such placements; provided, however, that no child shall be denied access to any program operated by the department of mental health, public health or social services to which in the judgment of the operating department the child should be admitted.

The expenses of the instruction and support actually rendered or furnished to such children with special needs, including their necessary travelling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, may be paid by the commonwealth; but the department shall issue regulations jointly with the departments of mental health, public health, youth services and social services defining the circumstances in which the commonwealth shall bear all or part of such cost, the circumstances in which school committees shall be required to bear part or all of such cost, and the circumstances in which a parent or guardian may be required to reimburse the commonwealth for part or all of such cost; provided, however, that in no event shall the cost to the school committee for placement under this section be less than

the average per pupil cost for pupils of comparable age within the city, town or school district; and, provided further, that in determining the cost to the parent or guardian, if any, no charge shall be made for any educational cost but only for support and care. In determining the cost to the parent or guardian the department shall apply criteria which take into account relative ability to pay.

The department shall direct and supervise the education of all such children, and the commissioner of education shall state in his annual report their number, the cost of their instruction and support, the manner in which the money appropriated therefor has been expended, to what extent reimbursed and such other information as he deems important.

Nothing contained herein shall affect the continued authority of the departments of mental health and public health over all non-educational programs and all treatment for residents or patients in institutions under their control.

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State Regulations.

603 CODE OF MASSACHUSETTS REGULATIONS:
DEPARTMENT OF EDUCATION

311.0 Evaluation: TEAM'S composition for writing the IEP.

For each individual evaluation, the persons described in ¶¶ 311.1 to 311.6 shall meet to write the IEP of the child. In addition, those persons described in ¶ 311.7 shall be included in the TEAM meeting at the discretion of the Administrator of Special Education.

+311.1 A representative of the school committee, other than the child's teacher, who is qualified to provide or supervise the provision of special education, and who shall act as the

chairperson, or designate a TEAM member to act as chairperson.

+311.2 A teacher who has recently had or currently has the child in a classroom or other teaching situation.

+311.3 A parent of the child.

+311.4 The child, at his/her request, if such child is of ages fourteen through twenty-one. The TEAM Chairperson shall notify any child who is at least fourteen, for whom an IEP is to be written, of his/her right to be present at and to participate in the writing of such IEP and shall keep a written record of such notification and of the child's response. If the child is younger than fourteen, the TEAM may invite such child to be present at and participate in the writing of such IEP, if the TEAM decides that such presence is necessary or desirable and in the best interest of the child. A child who attends an evaluation meeting may be accompanied by anyone of his/her choice.

+311.5 Upon request of the child's parents and at their expense, any other person outside the school system.

+311.6 Other individuals who have conducted assessments as described in ¶ 319.3 as part of the evaluation, provided that the TEAM shall include at least one teacher or other specialist trained in the area of the child's suspected special needs. In the case of a comprehensive health assessment a registered nurse may represent the physician.

+311.7 Other individuals, as determined by the Administrator of Special Education, who may be necessary to write an IEP for the child. These individuals may be, but are not limited to: a registered nurse, social worker with a masters degree in social work, or a certified guidance or adjustment

counselor; a certified psychologist or one licensed to practice in Massachusetts, a physician licensed to practice in Massachusetts, a regular or special education teacher, a consulting teacher, an approved vocational educator, an early childhood specialist.

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327.1 A child who, at the time of referral for evaluation, was in the regular education program, shall remain in that regular education program, unless the school committee or the child's parents submit a written statement to the Regional Branch Office of the Division showing that the child's remaining in such program endangers the health or safety of the child or substantially disrupts such program for other children. The Regional Branch Office may refer the matter to the Bureau of Special Education Appeals. If the showing is made, the Regional Branch Office (or the Bureau of Special Education Appeals, if the matter has been referred to it) shall within thirty days of the written statement approve an appropriate placement for the child.

327.2 A child who, at the time of referral for evaluation, was in a special education program paid for by the school committee shall remain in that special education program unless the child's parents wish the child to be in the regular education program, in which case the child shall be placed in such regular education program; unless the school committee submits a written statement to the Regional Branch Office of the Division showing that the child's remaining in such special education program or being placed in the regular education program (if requested by the parents) endangers the health or safety of the child or substantially disrupts such program for other children. The Regional Branch Office may refer the matter to the Bureau of Special Education Appeals. If the showing is made, the Regional Branch Office (or the Bureau of Special Education Appeals if the matter has been referred to it) shall, within

thirty days of the written statement, approve an appropriate placement for the child.

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330.0 *Evaluation: Immediate placement upon parental consent; distribution of IEP; further appeal.*

330.1 Where the IEP of a child in need of special education has been accepted by that child's parent, the child shall be placed immediately in the specified program. No child shall be placed in a special education program without parental consent, as evidenced by acceptance of an IEP.

330.2 The Administrator of Special Education shall send a copy of the accepted IEP to each person directly responsible for the objectives specified in the IEP; provided that the IEP shall not be sent to personnel other than school committee employees unless the parents consents.

330.3 Where the parent has decided to reject the IEP, the provisions of Chapter 4 shall be applicable.

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331.0 *Evaluation: Emergency evaluation and placement.*

An emergency placement can be made on the basis of an emergency evaluation. An emergency evaluation must include one or more assessments as described in ¶¶ 319.1 through 319.3. Such placement can be made in the following cases:

331.1 Where a child demonstrates repeated instances of dangerously assaultive or self-abusive behavior, such child shall be provided for in the following manner:

+331.1 (a) The child shall be referred immediately by the Administrator of Special Education for an evaluation which shall, with parental consent, be convened the same day, and shall recommend no later than the following day a temporary placement for such child, for a period not to exceed ten days. The school committee shall provide or arrange for the provision of such temporary placement, upon the parent's consent.

+331.1 (b) The parent shall be informed immediately of the child's behavior and shall participate if possible within the constraints of time, in the placement decision. No special education placement shall be made without the prior written consent of the child's parent.

+331.1 (c) No later than fifteen days after the decision of the evaluation, an evaluation of the child shall be completed which includes all appropriate assessments. All of the provisions of these regulations relating to evaluations shall apply, except that which establishes a thirty-day time limit for completion of such evaluations.

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332.0 *Evaluation: Placement upon new residence.*

332.1 Where a child's family has moved, and such child was in a special education program provided by the school committee of the former community of residence, the school committee with jurisdiction over the child's new residence, shall place the child immediately in a comparable program upon agreement between the Administrator of Special Education of the new community of residence and the child's parents.

332.2 The IEP written for the child by the school committee of the former community of residence and accepted by the

parent remains in effect until, with the consent of the parent, the school committee of the new community of residence initiates a new evaluation and a new IEP is written and accepted by the parent.

332.3 The school committee of the new community of residence shall assume financial responsibility for the child's special education program as of the actual date of the child's family's new residence, unless the school committees of the new and former communities of residence and the child's parents agree on a different date for transfer of responsibility.

332.4 Notwithstanding the preceding provisions of this paragraph, no school committee shall pay for a child's special education program in a private school that is not approved by the Division. If a school committee outside of the state placed a child in such an unapproved private school, the school committee of the child's family's new residence shall immediately place the child in a comparable approved private program (in accordance with ¶ 504.0) or public school program, with the consent of the parent, until a new IEP is written and accepted in accordance with ¶ 332.2.

. . . . . .

333.0 *Review of the child's progress: Ten-month and annual reviews.*

Each school committee shall provide for a review of the progress of each child who has been placed in a special education program. Such review of each child's progress shall be conducted within ten months after the initial placement of the child, and thereafter annually on or before the anniversary date of implementation of the IEP. Whenever possible, the review shall be scheduled near the time that there may be a change in the personnel providing the major services to the child under

the IEP, as when the child is to move from one grade or school to another. The review shall be conducted as follows:

+333.1 The Administrator of Special Education, the parents and the person(s) providing the major services to the child under the IEP shall meet and make a careful review of the child's progress based upon the progress reports submitted by the TEAM liaison under ¶ 337.1 and the observations of those working with the child. At least ten days prior to the review meeting the Administrator of Special Education shall invite, in writing, the child's parents, and where appropriate, the child, to attend and participate in the review meeting. The Administrator of Special Education or the parents may at their discretion invite other person(s) who have worked with, are working with, or will be working with the child to attend the review meeting.

+333.2 The participants in the review meeting shall determine:

333.2 (a) Whether the child has achieved the goals set forth in the IEP.

333.2 (b) Whether the child has met the criteria which indicate readiness to enter a less restrictive program as defined in ¶ 332.2.

333.2 (c) Whether the program the child is in should be specifically modified to make it more suitable to the child's needs.

333.2 (d) Whether it is desirable to refer the child for a re-evaluation. Parental consent shall be obtained prior to the re-evaluation.

+333.3 The participants in the review meeting shall write an amendment to the IEP for the child, in accordance with

¶ 335.0, within ten days after the review meeting. The amendment must specify the service provision elements, specific goal modifications, and be signed by the parent indicating approval of the amended IEP. If the review results in a more restrictive prototype, a new IEP must be prepared in accordance with ¶ 322.0. If, however, a re-evaluation of the child is scheduled in accordance with ¶¶ 333.2 (d) and 334.0, a written summary of the review meeting shall be conveyed to the parent within ten days after the review meeting. A new IEP shall be written upon completion of the re-evaluation.

. . . . . .

403.0 *Decision of the Bureau of Special Education Appeals.*

The hearing officer shall render a decision no later than twenty-five days after the completion of the hearing provided for by ¶ 402.0.

. . . . . .

409.0 *Placement of child where a placement is agreed upon or ordered.*

Notwithstanding the provisions of ¶¶ 504.1, 504.2, 504.3 or 504.4 of these regulations, whenever a placement is agreed upon, ordered, or otherwise required pursuant to the provisions of this chapter, such placement shall be made forthwith, without any unnecessary delay.

Supreme Court, U.S.
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CLERK

No. 84-433

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

TOWN OF BURLINGTON, et al.,
Petitioners,

v.

DEPARTMENT OF EDUCATION FOR THE
COMMONWEALTH OF MASSACHUSETTS, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari to review hypothetical legal questions and discretionary, fact-specific remedial orders and evidentiary rulings of the lower courts?

2. May the District Court, under the Education of the Handicapped Act, require a local education agency to reimburse parents for private school tuition and related expenses under the circumstances hypothesized by the Court of Appeals?

3. May a state education agency properly consider the local education agency's violations of procedural and substantive educational requirements as bearing on its ability to implement a proposed educational plan?

4. In an action under 20 U.S.C. § 1415(e)(2), may the trial court limit the evidence presented to that which is not repetitive of the evidence presented at the administrative hearing?

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No. 84-433

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

TOWN OF BURLINGTON, et al.,
Petitioners,

v.

DEPARTMENT OF EDUCATION FOR
THE COMMONWEALTH OF
MASSACHUSETTS, et al.,
Respondents.

On Petition for a Writ
of Certiorari to the United
States Court of Appeals
for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

STATEMENT OF THE CASE

Prior Proceedings

The respondents adopt the statement of prior proceedings contained in the decision of the Court of Appeals. Petition for Certiorari (hereinafter, "P.") at 89a-90a.

On May 29, 1984, the Court of Appeals issued its decision, affirming in part and reversing in part the decision of the District Court and remanding the case to the District Court for further proceedings. P. 87a-140a. After articulating the appropriate standards of judicial review and discussing the criteria to be considered by the District Court in determining whether to award retroactive tuition reimbursement to the parents or the Town, the Court of Appeals directed the District Court to review the state

administrative proceedings in accordance with the standards set forth in its opinion and held that, "[o]nce the district court reaches its decision, it may order reimbursement in accordance with the principles discussed [by the Court of Appeals]." P. 139a. Thereafter, the Town of Burlington ("the Town") petitioned the Court of Appeals for rehearing and rehearing en banc. That petition was denied on June 29, 1984. P. 146a.

Statement of Facts

There is no dispute that the child who has been the subject of these judicial proceedings for the past five years has severe learning disabilities and therefore is considered handicapped within the meaning of the Education of the

Handicapped Act (EHA).[1] Instead, the factual dispute in the courts below centers around the precise nature of the child's learning disabilities and the appropriate educational placement to meet his needs. Even with respect to this narrowly stated controversy, however, the petitioners' factual statement to this Court, which is not supported by any appendix or record citations, does not present a fair summary of the facts found by the District Court. Indeed, as will be discussed below, the District Court has yet to make findings on many essential and disputed matters which the petitioners nevertheless state as established facts.[2] Therefore, the respon-

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1/ See 20 U.S.C. § 1401(1).

2/ For example, the District Court specifically directed the parties not to

(footnote continued)

dents cannot adopt the statement of facts contained in the petition, but, rather, refer the Court to the statements of facts contained in the three District Court opinions. P. 30a-33a, 58a-61a, 71a-72a.

REASONS FOR DENYING THE WRIT

As provided in Rule 17 of the Rules

(footnote continued)
present evidence on and, in fact, heard no evidence on the parties' conduct with respect to subsequent evaluations of the child. P. 55a-56a. Nevertheless, petitioners recite as facts the actions of the parties in that regard. P. 6. Petitioners also state that the parents enrolled the child in private school "without seeking or obtaining permission from local or state educational authorities." P. 5. However, pursuant to the Court of Appeals' decision, the District Court has yet to determine whether the parents attempted in good faith to obtain an agreement with the school system before moving the child. P. 133a. Finally, petitioners flatly state that the child suffered a severe illness in 1977 and exhibited symptoms of serious emotional disturbance at home in 1979, P. 4, although no such findings were made by the District Court.

of this Court, "review on a writ of certiorari is not a matter of right but judicial discretion, and will be granted only when there are special and important reasons therefor." See also Ross v. Moffitt, 417 U.S. 600, 617 (1974); Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951); Wade v. Mayo, 334 U.S. 672, 680 (1948). No such "special and important reasons" warrant the granting that extraordinary writ. Furthermore, there are several reasons why granting the writ in this case would be particularly inappropriate.

I. THE QUESTIONS PRESENTED ARE NOT RIPE FOR CONSIDERATION BY THIS COURT.

The present posture of this case, in which critical factual findings and evidentiary rulings are yet to be made by the District Court, renders the legal questions presented entirely hypothet-

ical.[3/]

In discussing the right to reimbursement, the central issue presented by

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3/ Pursuant to the decision of the Court of Appeals, the District Court has yet to determine whether the Town committed procedural violations in developing an Individual Education Plan (IEP) for the child, P. 108a; whether the IEP proposed by the Town met the state's substantive standards, P. 112a; whether witnesses who testified at the administrative hearing should be permitted to testify again in court, P. 115a, 139a; whether the findings of the state hearing officer regarding procedural and substantive violations of state law should be accepted or rejected in part or in whole, P. 117a, 139a; whether the Town's 1979-80 IEP was improper, P. 124a; whether the Carroll School was then the correct placement, P. 124a; whether other factual circumstances, "not now apparent," warrant denial of reimbursement to the parents, P. 124a; whether placement at the Carroll School was appropriate for years subsequent to 1979-80, P. 124a; whether the parents' placement of the child in private school was "truly unilateral," P. 131a-133a; and whether the Town committed serious procedural errors, warranting denial of reimbursement to the Town. P. 138a. Indeed, even the nature of the child's learning disabilities is yet to be determined by the District Court. P. 120a, 139a.

this petition, the Court of Appeals identified as a critical factor "the yet-to-come final decision in the case." P. 126a. Only "if [the parents] are held to have acted appropriately" in placing the child in private school, P. 129a, will the District Court need to consider the parents' claim for reimbursement. Moreover, even if the parents prevail on remand, their right to reimbursement is not established by the decision of the Court of Appeals. Rather, the Court of Appeals simply discussed the factors to be considered by the District Court if and when the parents are found to have acted appropriately. The determination of whether to award such reimbursement remains within "the sound discretion of the district court." P. 137a. Until that discretion has actually been

exercised either to award or deny reimbursement, there is nothing for this Court to review.

The question of whether the trial court, in an action under 20 U.S.C. § 1415(e)(2), may limit the evidence presented in court to that which is "additional" to the evidence presented at the administrative level is similarly unripe for consideration by this Court in this case. Under the Court of Appeals' decision, the District Court, on remand, remains free to exercise its discretion either to receive or to exclude the evidence offered by the Town. P. 115a, 139a. Unless and until the District Court refuses to hear witnesses who testified or could have testified at the state administrative hearing, the issue of whether or not the trial court has the authority to limit the introduc-

tion of evidence in this way is not squarely presented. At trial, the District Court did not so limit the evidence, but rather permitted witnesses who had testified at the administrative level to testify again in court, and the Court of Appeals refused to rule that such a limitation is required. P. 114a. Moreover, even if such a limitation would be erroneous, any such error would be harmless to the Town if the District Court nevertheless rules in the Town's favor on the merits. It would therefore be premature and perhaps unnecessary for this Court to grant certiorari on this issue.

Since the legal questions presented by the petition may never actually arise in this case, allowance of a writ of certiorari on those questions at this stage of the proceedings would be unnecessary.

As stated by Justice Frankfurter, respecting the denial of a petition for certiorari in Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950):

> A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

This petition presents a perfect illustration of Justice Frankfurter's point. For this reason, if no other, the writ should not issue. This petition, however, also must fail because it runs a foul of other sound, self-imposed limits on this Court's certiorari jurisdiction.

II. CERTIORARI IS NOT WARRANTED TO REVIEW THE LOWER COURTS' DISCRETIONARY AND FACT-SPECIFIC EVIDENTIARY RULINGS AND REMEDIAL ORDERS.

As noted in Appalachian Power Co. v. American Institute of Certified Public Accountants, 80 S. Ct. 16 (1959), certiorari is not ordinarily granted where "the question is one that concerns the judgment of the District Judge in relation to a particular set of facts." Since each of the questions presented by the present petition involves the exercise of discretionary judgments by the lower courts, certiorari should be denied in this case.

The principal questions presented by this petition involve the remedy of reimbursement, which the Court of Appeals held might be available to the party that ultimately prevails in the District

Court. As recognized by the Court of Appeals, the appropriateness of such relief "is a question determined by balancing the equities," P. 137a, and the determination of whether to award reimbursement to the prevailing party is "committed to the sound discretion of the district court." P. 137a. This Court should resist the petitioners' invitation to exercise that judgment itself.

The District Court similarly has broad discretion in any case to exclude relevant evidence on the grounds that "its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403; see also Hamling v. United States, 418 U.S. 87, 127 (1974) ("District Court retains considerable

latitude even with admittedly relevant evidence in rejecting that which is cumulative"). Indeed, Rule 611(a) of the Federal Rules of Evidence explicity vests control over the mode of presenting evidence in the trial court so as to "avoid needless consumption of time." See also Geders v. United States, 425 U.S. 80, 87 (1976).

In actions brought under the EHA, the trial court's discretion to exclude cumulative evidence is, if anything, even broader than is generally the case because of the deference owed by the court to the administrative proceedings. Board of Education v. Rowley, 458 U.S. 176, 206 (1982). Thus, as recognized by the Court of Appeals, the determination of what evidence may be admitted "must be left to the discretion of the trial court." P. 114a, 115a. In order to

avoid unduly limiting that discretion, the Court of Appeals declined to adopt any rigid rules as to which witnesses may be allowed to testify. P. 114a. Because of the discretionary nature of such an evidentiary determination, review by this Court is unwarranted.

A final discretionary action that the petitioners ask this Court to review is the Court of Appeals' departure from what petitioners characterize as the "law of the case" with respect to the their right to be reimbursed by the parents for amounts expended on the child's tuition and related expenses. P. 21. Certiorari should be denied on that issue for several reasons.

First of all, what the petitioners characterize as the "law of the case" is, in fact, only dictum. At an earlier

stage of this case, in affirming the District Court's denial of a preliminary injunction, the Court of Appeals rejected the Town's contention that if it were required to pay the child's tuition pendente lite, it would be unable, as a practical matter, to recover that money if the Town prevailed on the merits of the case. P. 44a-45a. Without addressing the question of the Town's legal right to reimbursement, the Court of Appeals simply found that the Town had not made a sufficient showing of irreparable injury to warrant the issuance of a preliminary injunction in its favor. P. 45a, 46a-47a. Contrary to petitioners' contention, such a ruling cannot correctly be characterized as a holding that if the Town were to prevail on the merits it would be legally entitled to recover the tuition paid in the interim. Thus,

the law of the case doctrine is inapplicable here both because the Court of Appeals' previous statement on the issue of reimbursement was not "law" but dictum, Barney v. Winona & St. Peter Railroad Co. 117 U.S. 228, 231 (1886) (law of the case doctrine "does not apply to expressions of opinion on matters the disposition of which was not required for the decision"), and because that statement was made in the context of an interlocutory appeal, not a decision on the merits. See United States v. United States Smelting Refining & Mining Co., 339 U.S. 186, 198-99 (1950) (interlocutory order does not constitute law of the case).

Furthermore, as discussed in the preceding section, the Court of Appeals in its most recent decision did not hold

that the Town would be precluded from obtaining at least partial reimbursement if it ultimately prevails in the District Court, but rather left the question of reimbursement for the District Court to resolve. P. 137a. Thus, even if the Court of Appeals' previous suggestion that such reimbursement might be available could be viewed as the law of the case, that "law" was not violated by its more recent discussion of the issue.

In any event, even if it accurately could be said that the Court of Appeals departed from the law of the case, it was entirely within its discretion to do so. United States v. United States Smelting Refining & Mining Co., supra at 199 ("'law of the case' is only a discretionary rule of practice"); Messenger v. Anderson, 225 U.S. 436, 444 (1912)

("law of the case . . . merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power"); Arizona v. California, 460 U.S. 605, 618 (1983) (same). Therefore, insofar as such a departure occurred here, granting of the petition for a writ of certiorari to review that discretionary action is not warranted.

III. THE COURT OF APPEALS' HOLDING THAT REIMBURSEMENT MAY BE AVAILABLE TO THE PREVAILING PARTY UNDER THE EDUCATION OF THE HANDICAPPED ACT DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The Court of Appeals held that, under § 1415(e)(2) of the EHA, which allows "such relief as the district court determines is appropriate," retroactive reimbursement may be awarded to the prevail-

ing party.[4] The Court of Appeals' opinion also sets forth circumstances under which it would not be appropriate to award retroactive reimbursement to either the Town or the parents as the prevailing party on remand. P. 126a-138a.[5] For example, if the District Court finds that the Town acted in bad

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4/ The court's opinion is limited to the availability of retroactive reimbursement for tuition and related expenses. The petitioner erroneously equates retroactive reimbursement with damages, generally. P. 24. The term damages is much broader than retroactive reimbursement and encompasses such other relief as compensatory and punitive damages, which are not at issue here. See, e.g., Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348, 1356 (5th Cir. 1983); see generally Hyatt, Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies, 29 U.C.L.A. L. Rev. 1, 42-51 (1981).

5/ Up until the time of trial, the parents had paid for one year of the child's private school placement, and the Town had paid for most of the two subsequent years. Both the parents and the Town seek retroactive reimbursement for the monies paid.

faith by committing serious procedural violations, the Town may not be able to recover retroactive reimbursement even though the District Court may find that the educational plan it proposed was appropriate. P. 138a. Similiarly, if the parents are found to have acted inappropriately in placing their child in a private school during the pendencey of the administrative proceedings, reimbursement may not be available to them. P. 126a-133a. Within the guidelines set forth by the Court of Appeals, whether to allow retroactive reimbursement is "a matter of equitable relief, committed to the sound discretion of the district court." P. 137a.[6/]

6/ The petitioners apparently misperceive the Court of Appeals' holding, since they request that "[t]he First Circuit's award of damages in this case" be

(footnote continued)

The Court of Appeals' holding that an award of retroactive reimbursement requires a balancing of the equities is consistent with the language of § 1415(e)(2), which authorizes the District Court to grant "appropriate" relief. The balanced approach to reimbursement under the EHA taken by the Court of Appeals is correct and should be permitted to stand, subject, of course, to appellate review of any alleged abuses in the actual application of that approach by the trial courts.

Contrary to petitoners' assertions, the Court of Appeals' equitable approach

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(footnote continued)
reversed. P. 28. There has been, of course, no award of damages to any party; the case has been remanded for a new trial. The court stated, "[o]nce the district court reaches its decision, it may order reimbursement in accordance with the principles discussed in section IV, supra" (emphasis added). P. 139a.

to the availability of reimbursement is consistent with decisions of other circuits. See Supreme Court Rule 17.1(a). Any distinctions between the Court of Appeals' decision and those of other circuits certainly do not present the type of conflict among the circuits which warrants the granting of certiorari. Cf. Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955)(quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)) (certiorari is appropriate "in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.")

Few circuits have addressed the issue of retroactive reimbursement in as comprehensive a manner as the First Circuit. The issue ordinarily has arisen in a piecemeal fashion, and the courts accord-

ingly have limited their rulings on reimbursement to particular factual settings.

Those circuits that have considered the issue of retroactive tuition reimbursement to the prevailing party are in general agreement that under some circumstances reimbursement may be awarded. E.g., Anderson v. Thompson, 658 F.2d 1205, 1213 (7th Cir. 1981); Department of Education v. Katherine D., 727 F.2d 809, 817 (9th Cir. 1983).7/

The cases upon which petitioners rely to show a conflict among the circuits have not considered the availability of retroactive reimbursement to the prevail-

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7/ In fact, the Court of Appeals follows the rule first established in Anderson that where a town fails to comply with the EHA's procedural requirements it may not be able to recover retroactive reimbursement. Anderson, 658 F.2d at 1214. P. 138a.

ing party at the conclusion of the judicial proceedings. The Courts of Appeals for the Second and Third Circuits, for example, have addressed the issue of interim funding during the pendency of the appeal. E.g., Vander Malle v. Ambach, 673 F.2d 49, 52 (2nd Cir. 1982); Grymes v. Madden, 672 F.2d 321, 323 (3rd Cir. 1982).

The Courts of Appeals for the Fourth and Fifth Circuits have addressed the narrow issue of the availability of reimbursement to parents who have transferred their child to a private school during the pendency of the administrative and judicial proceedings without the agreement of state or local authorities. E.g., Stemple v. Board of Education, 623 F.2d 893, 898 (4th Cir. 1980), cert. denied, 450 U.S. 911 (1981); Stacey G. v.

Pasadena Independent School District, 695 F.2d 949, 953-54 (5th Cir. 1983).[8/]

The Eighth and Eleventh Circuit cases upon which petitioners also rely, concern the availability of compensatory and punitive damages where a child has remained in an inappropriate placement; they do not address the availability of retroactive tuition reimbursement to the prevailing party, the remedy at issue here. E.g., Miener v. Missouri, 673 F.2d 969, 979 (8th Cir.), cert. denied, 459 U.S. 909 (1982); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983).

8/ Although the Fourth Circuit has not yet permitted reimbursement to parents who have placed their child in a private school pending the administrative and judicial proceedings, e.g., Rowe v. Henry County School Bd., 718 F.2d 115, 119 (4th Cir. 1983), it has declined to hold that reimbursement would never be appropriate under any circumstances. Hessler v. State Board of Education, 700 F.2d 134, 139 (4th Cir. 1983).

Thus, a review of the cases reveals that petitioners are simply wrong in claiming that the First Circuit departs from virtually every other circuit to have considered the issue of reimbursement. P. 23. The distinctions which appear in the cases are attributable to the intensely fact-specific nature of these cases as well as the varying procedural contexts in which these cases arise. The law on reimbursement is still evolving in most of the circuits. Until a clear split among the circuits has crystalized, certiorari should be eschewed in favor of "[a] series of decisions by the courts of appeals [which] may well provide more meaningful guidance to the bar than an isolated or premature opinion of this Court." Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 945 (1978) (Stevens, J.,

respecting denial of petition for writ of certiorari).

IV. THE COURT OF APPEALS' DECISION AS TO THE SCOPE OF THE DISTRICT COURT'S REVIEW IS CONSISTENT WITH DECISIONS OF THIS COURT.

A. The Court Of Appeals' Remand To The District Court To Consider The Town's Procedural Violations Was Compelled By Rowley.

The state hearing officer found that the Town failed to comply with numerous procedural requirements in the development of the IEP at issue as well as previous IEPs prepared by the Town. P. 13a, 17a-20a. The District Court considered such violations to be irrelevant to the appropriateness of an educational plan. P. 60a. However, on the basis of this Court's decision in Board of Education v. Rowley, 458 U.S. 176 (1982), the Court of Appeals remanded the case to the Dis-

trict Court for consideration of the Town's procedural violations. P. 107a-108a.[9/] As this Court recognized in Rowley, the EHA contemplates a comprehensive regulatory scheme in which the federal government provides financial support to those states that offer free educational services for handicapped children. Instead of attempting to provide detailed substantive standards for the kind of education that should be provided to

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9/ Insofar as some of the procedural violations found by the hearing officer involve state law, we interpret the Court of Appeals' decision as requiring the District Court to consider and give due weight to the procedural violations found by the state hearing officer. The District Court itself is precluded from determining whether there were violations of state law and awarding relief on that basis. Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900, 917 (1984); see Smith v. Robinson, 104 S. Ct. 3457, 3464 n. 6 (1984).

handicapped children with the funds provided under the EHA, Congress has established a series of procedural requirements designed to insure that the specific educational needs of the handicapped student in question will be met. In Rowley, this Court emphasized the importance of the EHA's procedural safeguards:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation in every stage of the administrative process, see, e.g., §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Rowley, 458 U.S. at 205-06.

Thus, Rowley provides that procedural violations should be of central concern to a district court exercising its judicial review function under 20 U.S.C. § 1415(e)(2):

> . . . [A] court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 206-07.

Thus, since the procedural requirments of the EHA are as central to the child's rights as is the specific classroom instruction offered, the Court of Appeals properly remanded the case to the District Court for consideration of the hearing officer's finding of "continuing procedural irregularity." P. 13a.

B. The Guidelines Established By The Court Of Appeals For The Admission Of "Additional Evidence" Are Consistent With The Rowley Requirement That The Administrative Proceedings Be Accorded Due Weight.

The judicial review provision of the EHA provides that "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). The Court of Appeals held that the word "additional" should be construed in its ordinary sense to mean supplemental. While the court left to the discretion of the trial judge what additional evidence should be admitted, it cautioned:

> Thus construed, this clause does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony; this would be entirely inconsistent with the usual meaning of "additional." We are fortified in this interpretation because it structurally assists in giving due weight to the administrative proceeding as Rowley requires.

P. 113a-114a.

The Court of Appeals properly considered the Rowley requirement that the administrative proceedings be given due weight in setting guidelines for the District Court on the issue of "additional evidence." Without the limits suggested by the District Court, the judicial review process would become the trial de novo proscribed by Rowley. Allowing the parties to introduce any evidence they wish, including repetitive and refined testimony from the same witness who testified at the administrative hearing,

merely trivializes, rather than gives "due weight," to the exhaustive administrative process set out by Congress. Cf. Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir.), cert. denied, 104 S.Ct. 196 (1983)(reviewing town's educational placement under an abuse of discretion standard "renders the administrative hearings provided for by the Act virtually meaningless").

Since the guidelines set forth by the Court of Appeals are thus consistent with the plain meaning of the term "additional," other provisions of the EHA that set forth a comprehensive administrative scheme, and the Rowley "due weight" requirement, those guidelines need not be reviewed by this Court.

CONCLUSION

For the reasons stated above, the respondents request that the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit be denied.

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No. 84-433.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,

v.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO a/k/a JOHN DOE, SR., AS HE IS NEXT FRIEND MICHAEL PANICO a/k/a JOHN DOE, JR.,
RESPONDENTS.

Petitioners' Reply Brief.

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RESPONDENTS.

Petitioners' Reply Brief.

Preface.

Holding to the implication of Rule 22.5 that a reply brief should be "addressed to arguments first raised in the brief in opposition," petitioners will avoid the temptation to respond to those arguments that merely attempt to meet the reasons for granting the writ advanced in the petition.

Facts.

In their brief in opposition at pp. 4-5, respondents suggest that petitioners have included facts not in the record. Respondents should know better. Petitioners opposed respondent Department of Education's application for preliminary injunction on the basis of the refusal of the parents to make Michael available for an evaluation (Record Appendix (hereinafter R.A.) I, pp. 44-50), and then sought summary judgment on the same ground (R.A. I, pp. 63-64). The First Circuit referred to these portions of the record in its opinion (A. 122a, 123a), and petitioners sought to correct the reference in their petition for rehearing at pp. 21-23. The parents have never sought to deny or explain this material. That Judge Zobel received no evidence at trial on this point is immaterial.

Petitioners stated that the parents enrolled Michael in the Carroll School "without seeking or obtaining permission from local or state educational authorities." Not only is the record devoid of any effort to obtain such permission but at the administrative hearing Mr. Panico submitted in written form, as well as orally, a chronology of Michael's progress through the Burlington school system. For the written chronology see R.A. IV, pp. 415-425; for the oral testimony see R.A. III, pp. 9-71 and pp. 166-267. He further testified at trial (R.A. II, pp. 3-3 - 3-85). At no time did he mention seeking permission from anyone to place Michael in the Carroll School. This is of particular import, since the written chronology deals in some detail with the events of the summer of 1979 between the time that the parents rejected the IEP on July 3, 1979 and the commencement of hearings on September 26, 1979 (R.A. IV, p. 423). In the circumstances, it is almost inconceivable that if Mr. Panico had asked permission from state or local authorities to enroll Michael in the Carroll School he would not have mentioned it.

Petitioners do not state that Michael suffered a severe illness in 1977 but in the ensuing year (Pet., p. 4). In fact, he suffered this serious illness in 1979, and it was the subject of detailed

testimony by Mr. Panico (R.A. III, pp. 49-50). With respect to the events of May 24, 1979, see R.A. II, pp. 3-31, 3-32 and R.A. III, pp. 539-540.

We recognize that the faults found by respondents in petitioners' statement of the case are at best peripheral to the issue of whether certiorari should be granted. We are aware that Rule 19.1 states that "requests to certify the record prior to action by the court on the petition for writ of certiorari . . . should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by this court." Being of opinion that, except as to question 6, the certification of the record is not essential in this case, petitioners will ask the court below to certify only pages 44 through 50 of Volume I of the Record Appendix (the only pages needed for question 6), with the understanding that if respondents are still dissatisfied with any facts alleged by petitioners and believe that the record is essential, they may under Rule 19.1 request that it be certified to the Court.

Argument.

The Petition for Certiorari Presents Issues Ripe for Consideration by This Court.

This "case" has been pending now for over five years and will soon reach the fifth anniversary of its hegira through the courts. There have been appeals from three interlocutory orders, and an appeal and cross-appeal from the judgment. The slip opinion of the First Circuit ran to sixty-two pages. The purpose of the lengthy opinion appears to have been to set forth definitively substantive and procedural EHA law in the First Circuit. There is not a single *finding* made by the District Court that the Court of Appeals found to be plainly wrong. It ruled that further findings were necessary, however, in three areas: (a) whether petitioners' alleged violations of Michael's rights were

serious (A. 138a); (b) which of the experts' supposedly conflicting diagnoses of Michael's condition was correct (A. 119a-120a); and (c) the "equitable" considerations that will determine the parents' right to damages *if* the 1979-1980 IEP prepared by petitioners is *again* found to be *appropriate* (A. 137a-138a).

Respondents argue that because there was a remand for further findings, certiorari should not be granted (Br. in Opp., pp. 6-11). A fair summary of reasons II and V for granting a writ is that findings need be made in none of these areas because they are not germane. As the First Circuit noted (A. 94a):

> The appellants urge as error the district court's refusal to give any weight to the hearing officer's determination that the Town violated numerous state substantive and procedural regulations plus several federal provisions in its handling of the child's special education. The Town's [Petitioners'] response is that findings concerning past practices regarding compliance with state educational standards and procedures were irrelevant to the question appropriately before the hearing officer, *viz.*, is the IEP proposed by the Town adequate and appropriate?

The argument that certiorari is not granted in cases in which an appellate court remands for further findings of fact is refuted by the cases. See, *e.g.*, *Burks* v. *United States*, 437 U.S. 1, 4-5 (1978); *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 45 (1979); *Town Court Nursing Center, Inc.* v. *Beal*, 586 F.2d 280 (3rd Cir. 1978), *rev. sub. nom O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 781 (1980), *on remand*, 626 F.2d 1114 (3rd Cir. 1980). Here, if petitioners prevail on any of the questions raised by their petition (except for Question 3), no further facts need be found. In a case as old, lengthy and complex as this one is, the avoidance of further trial proceedings is a basis for granting rather than denying review by certiorari. If petitioners do not prevail on questions 1,

2, 4, 5 or 6 and there is to be yet another trial, it is highly desirable to have the evidentiary scope of that trial clarified as question 3 seeks to clarify it.

So much would be true even if the First Circuit's opinion had not determined issues of EHA law in a manner radically different from that in which those issues have been determined by other circuits. It did, however, in at least four of its holdings: (a) that parental self-help to private education for a handicapped child is not a bar under 20 U.S.C. § 1415(e)(3) to obtaining reimbursement for the expenses of such education (A. 126a-133a); (b) that EHA creates a remedy for damages[1] resulting from an inappropriate placement (A. 133a-138a); (c) that a state may "punish" a local school district for past procedural violations by requiring it to fund private education for a handicapped child, even though Federal law requires placement in the least restrictive setting and even though the local school district has prepared an IEP designed to ensure an adequate education in such a setting (A. 124a, 138a); and (d) that even if the parents choose an inappropriate private school for the education of a handicapped child, they are still entitled to some damages if they prevail at the administrative level, 20 U.S.C. § 1415(b)-(d), and under "equitable" considerations may be entitled to damages from the date of placement to the date of judgment (A. 135a-137a).

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[1] Respondents attempt to distinguish between "reimbursement" of expenses for private-school tuition and related costs and "damages" (Br. in Opp., pp. 20 n.4, 26). In almost every case cited on p. 23 of the petition for the proposition that EHA does not create a remedy for damages, the damages sought were at least such reimbursement. See *Doe* v. *Anrig*, 692 F.2d 800, 809-810 (1st Cir. 1980); *Colin K.* v. *Schmidt*, 715 F.2d 1, 8, 10 (1st Cir. 1983); *Marvin H.* v. *Austin Independent School District*, 714 F.2d 1348, 1349-1350, 1352-1356 (5th Cir. 1983); *Anderson* v. *Thompson*, 658 F.2d 1205, 1208, 1214 (7th Cir. 1981); *Mount View-Los Altos Union High School District* v. *Sharron B.H.*, 709 F.2d 28, 30 (9th Cir. 1983). In *Miener* v. *State of Missouri*, 673 F.2d 969 (8th Cir. 1982) and *Powell* v. *Defore*, 699 F.2d 1078 (11th Cir. 1983) reimbursement was not part of the damages sought by the plaintiffs. See also *Rowe* v. *Henry County School Bd.*, 718 F.2d 115, 116, 119 (4th Cir. 1983); *Zvi D.* v. *Ambach*, 694 F.2d 904, 908 (2d Cir. 1982) (affirming denial of preliminary injunction which sought reimbursement); *Monahan* v. *Nebraska*, 645 F.2d 592, 598 (8th Cir. 1981) (same).

Respondents seem to concede that holdings (a) and (c) are found in the First Circuit's opinion and attempt to deny holding (b) by distinguishing between "reimbursement" and "damages."[2] See n.1, *supra*.

Their response (Br. in Opp., pp. 7-8) to holding (d) is:

> In discussing the right to reimbursement, the central issue presented by this petition, the Court of Appeals identified as a critical factor "the yet-to-come final decision in the case" (A. 126a). Only "if [the parents] are held to have acted appropriately" in placing the child in private school (A. 129a), will the District Court need to consider the parents' claim for reimbursement. Moreover, even if the parents prevail on remand, their right to reimbursement is not established by the decision of the Court of Appeals. Rather, the Court of Appeals simply discussed the factors to be considered by the District Court if and when the parents are found to have acted appropriately.

Petitioners disagree. The opinion states (A. 135a-136a):

> We hold, therefore, that where the final state administrative decision rules a town's proposed IEP inappropriate and orders the town to fund placement, and the parents have complied with and implemented that decision, a town or local educational agency is estopped from obtaining reimbursement [in this case of money paid under protest to the parents for private school tuition] for the time period, usually one year, covered by the state agency decision and order.

It then proceeds to discuss an argument supposedly made by respondents that petitioners should be estopped from seeking reimbursement, *i.e.*, from seeking to avoid paying damages,

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[2] Whether the plaintiffs in the cases cited on pp. 20 and 26 of the brief in opposition sought damages beyond "reimbursement" is immaterial. If they had been entitled to reimbursement, the courts presumably would have so held.

for the period up to the date of judgment,[3] even if the findings of the District Court concerning the 1979-1980 IEP were correct. Rejecting this argument, the First Circuit states (A. 137a):

> In *Brookline* [*Doe* v. *Brookline School Committee*, 722 F.2d 910 (1st Cir. 1983)], we recognized the *availability* of reimbursement to a prevailing party, 722 F.2d at 921; see also *Doe* v. *Anrig II*, 728 F.2d 30 at 31 but did not hold that reimbursement was *automatically* to be awarded as a result of prevailing on the merits. We view it then, as now, to be a matter of equitable relief, committed to the sound discretion of the district court.

In other words, the parents are absolutely entitled to be reimbursed for some private school tuition and may be entitled to retain moneys paid to them by petitioners for other private school tuition, even if their placement of Michael in the Carroll School was inappropriate, or so, at least, the First Circuit construes EHA.

None of the above-discussed holdings, which petitioners assail and which respondents seem reluctant to acknowledge, is the least bit "cloudy" in the present state of the record. See *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) which is cited on p. 11 of the brief in opposition. The Court of Appeals faced the *Stemple* [*Stemple* v. *Board of Education*, 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981)] question, holding (a), "squarely", and ruled that parental self-help is not a bar to reimbursement (A. 127a).

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[3] In all fairness it must be said that respondents made no such argument at least in the form represented in the opinion. If by "estoppel," the Court meant to refer to the doctrine of equitable estoppel, such an argument would have bordered on the absurd. As Black's Law Dictionary, 648 (Revised 4th ed.) notes: "An estoppel arises when one is concluded and forbidden by law to speak against his own act or deed. *Gural* v. *Engle*, 128 N.J.L. 252, 25 A.2d 257, 261." At no time in this case have petitioners ever sought to speak against their own word or deed. If the reference was to estoppel by judgment (in this case, administrative decision), the short answer would be that no such estoppel operates with respect to a decision under review in the very proceeding in which review is sought.

The memorandum of decision in the District Court fully sets forth the circumstances of the decision to withdraw Michael from the Burlington Public Schools (A. 59a-60a); the nature of Michael's learning disability and special needs (A. 60a-61a); and the basis for the court's conclusion that the town had prepared an appropriate IEP and would have implemented it (A. 62a-63a, 66a-67a). The record plainly raises the question of whether holdings (b), (c) and (d) are correct.

Although it is true, as respondents assert (Br. in Opp., pp. 9-10), that no witness offered by petitioners has yet been barred from testifying in the District Court, what petitioners seek with respect to question 3 is, should the court reach the issue, reversal of the holding that persons who testified or might have testified at the administrative level are rebuttably presumed to be disqualified from testifying in the District Court (A. 115a). If there is to be yet another trial in the District Court, the time to review that holding is now. At any new trial, petitioners intend to offer the testimony of persons who at least arguably although not practicably could have testified at the administrative hearings. To argue that petitioners should offer the testimony of these witnesses in the District Court and, if it is excluded, make this the subject of yet another appeal is to pervert the whole concept of ripeness. In announcing a rule of presumptive disqualification, the First Circuit has set a precedent that for reasons stated at pp. 17-20 of the petition is almost certainly in conflict with 20 U.S.C. § 1415(e)(2). District Courts in the First Circuit are now required to follow that rule, and courts elsewhere may be seduced by it. It, too, is deserving of immediate review.

In sum, every circuit but the First has held that 20 U.S.C. § 1415(e)(3) bars self-held by a parent absolutely or except in the most unusual circumstances; no court, except the First Circuit, has conceived of private education for a handicapped child under EHA as an amercement for *past* procedural or substantive violations of State law, much less the trivial violations that appear on the face of the hearing officer's report,

and such a concept flies in the face of the purposes of EHA; every circuit to consider the issue, with the exception of the First and Ninth and the possible exception of the Seventh, has ruled that damages including reimbursement for private education are not available under EHA; no court, except the First Circuit has ruled that persons who might have testified at an administrative hearing under 20 U.S.C. § 1415(b)-(d) are presumptively barred from testifying in court under § 1415(e)(2), which states flatly that the court "shall hear additional evidence." These issues, except the evidentiary issues, have arisen in one form or another in most of the circuits, see pp. 13, 23, 27-28 of the petition; resolution of the conflicts between the decision of the First Circuit in this case and those decisions of the other circuits in conflict with that decision should be delayed no further.

Conclusion.

For the reasons given, the petition for writ of certiorari should be granted.

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RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JOINT APPENDIX

Volume I

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Certiorari Granted December 3, 1984

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February 26, 1980	— Complaint of School Committee, Town of Burlington filed in the United States District Court for the District of Massachusetts.
April 30, 1980	— Complaint with substitute captions filed.
May 8, 1980	— Plaintiffs' motion for stay (request for Preliminary Injunction) filed.
July 24, 1980	— Decision of the District Court, Judge Zobel, denying Plaintiffs' motion for stay entered.
July 31, 1980	— Plaintiffs' Motion for Summary Judgment filed.
August 8, 1980	— Notice of Appeal by Plaintiff filed.
August 29, 1980	— Attorney Berman's letter of August 26, 1980 with attachments filed.
October 3, 1980	— Defendant Department of Education's Motion for Summary Judgment on Count II filed.
October 7, 1980	— Defendants' Doe Motion for Summary Judgment on Counts I and II filed.
November 19, 1980	— Memorandum of Decision and Judg- of the District Court, Judge Zobel, allowing Defendants' Motions for Summary Judgment on Count II entered.
December 11, 1980	— Plaintiff's Notice of Appeal filed.
December 12, 1980	— Defendant Department of Education's Motion to Amend Answer by adding Counterclaim and Motion for Preliminary Injunction on Counterclaim filed.

December 16, 1980 — Defendant Doe's memorandum filed.

December 24, 1980 — Plaintiffs' Further Statement in Opposition to Application for Preliminary Injunction.

December 29, 1980 — Plaintiff's Motion to Amend Complaint filed.

January 9, 1981 — Motion for Stay Pursuant to Rule 8(a) F.R.A.P. filed in the Court of Appeals.

January 28, 1981 — Memorandum and Order of the First Circuit Court of Appeals denying the Motion for a Stay entered.

February 9, 1981 — Plaintiffs' Motion to Amend Complaint filed.

February 12, 1981 — Order of the District Court, Judge Zobel, that pending final determination on the merits the Town of Burlington shall reimburse the Defendant Doe for expenses paid or now due in connection with the educational placement of Doe, Jr. entered.

February 18, 1981 — Plaintiffs' Notice of Appeal filed.

June 18, 1981 — Opinion and Judgment of the First Circuit Court of Appeals, vacating District Court's grant of Summary Judgment and Order of February 12, 1981 and affirming denial of preliminary injunction entered.

July 9, 1981 — Mandate from the First Circuit Court of Appeals with instructions that Count II be dismissed and trial proceed on Count I received.

November 24, 1981 — Motion of Plaintiffs for Summary Judgment filed.

March 18, 1982 — Pretrial Order of the District Court, Judge Zobel, entered.

May 13, 1982 — Civil non-jury trial commences before Judge Zobel.

June 22, 1982 — Plaintiff's post-trial Brief filed.

August 13, 1982 — Memorandum of decision of the District Court, Judge Zobel, to the effect that the Town is not responsible for the Defendant Doe's education expenses for the years 1979-1982 entered.

September 9, 1982 — Defendants' Motion for Reconsideration and/or New Trial Filed.

September 30, 1982 — Defendants' Motion for Reconsideration and/or New Trial Denied, Judge Zobel

October 29, 1982 — State Defendants Memorandum in Support of its Opposition to Plaintiffs' proposed form of judgment filed.

January 17, 1983 — Stipulation of Facts on Plaintiffs' Request for Reimbursement filed.

March 7, 1983 — Opinion of the District Court, Senior Circuit Judge Aldrich (sitting by designation), ordering reimbursement of the Town subject to the Defendants' showing of the Town's actual savings filed.

May 10, 1983 — Judgment of the District Court, Judge Zobel, entered May 9, 1983.

June 6, 1983 — State Defendant's Notice of Appeal filed.

June 7, 1983 — Defendants' Doe Notice of Appeal filed.

June 8, 1983	— Plaintiffs' Cross-Appeal filed.
May 29, 1984	— Opinion and Judgment of the First Circuit entered.
June 18, 1984	— Plaintiffs' Petition for Rehearing en banc filed in the First Circuit Court of Appeals.
June 29, 1984	— Order of the First Circuit Court of Appeals denying the petition for rehearing en banc, entered.
July 9, 1984	— Mandate issued; the judgment of the District Court reversed in part, affirmed in part and the case remanded.
September 18, 1984	— Petition for Writ of Certiorari filed in the Supreme Court of the United States.
December 3, 1984	— Order of the Supreme Court of the United States entered granting the Petition limited to questions I and V presented.

[The following pages 5 through 49 contain selected BSEA hearing exhibits, which were offered collectively at the District Court Trial on May 14, 1982 as Plaintiffs' Exhibit 2 at Tr. 2-37 (R.A. II, p. 2-37), and are found in R.A. Volume IV as noted.]

[BSEA Exhibit, found at R.A. IV, p. 135.]

BURLINGTON PUBLIC SCHOOLS
BURLINGTON, MASSACHUSETTS

May 31, 1979

Mr. and Mrs. Robert Panico
28 Fieldstone Drive
Burlington, Mass. 01803

Dear Mr. Panico,

I appreciate your phone call of May 30, 1979, indicating your intent to have Dr. Lott coordinate any psychological assessments for Michael through the Mass General Hospital.

I have taken the liberty of sending to Dr. Lott the additional educational assessments that were carried out in May, 1979.

I am sorry that the appointment scheduled with Mr. McAleer could not be mutually arranged, and look forward to your meeting him directly at the June 4, 1979 meeting at Memorial School.

Per your request, I will contact Dr. Lott so that we may discuss any outstanding concerns regarding more testing for Michael.

Thank you for your continued cooperation in trying to provide appropriate education planning according to Michael's needs.

Sincerely,
/s/
Jean Arin
Core Evaluation
Administrator

JA:lt
Enclosures
cc: Dr. Lott
Kevin Foley

[BSEA Exhibit, found at R.A. IV, p. 136]

BURLINGTON PUBLIC SCHOOLS
BURLINGTON, MASSACHUSETTS

May 31, 1979

Dr. Lott
Mass General Hospital
Boston, MA 02114

Re: Michael Panico

Dear Dr. Lott,

In order to insure that you have the total packet of information regarding Michael Panico, I am enclosing our most recent assessments that will be presented at the June 4, 1979 meeting for Michael.

I look forward to being able to discuss with you any additional testing.

Thank you for your cooperation in developing appropriate educational planning for Michael according to his specific needs.

Sincerely,
/s/
Jean Arin
Core Evaluation
Administrator

JA:lt
Enclosures
cc: Kevin Foley
Mr. and Mrs. Panico

[BSEA Exhibit, found at R.A. IV, pp. 149-162, 164-177, 398-409 and 511-524. The format has been changed slightly to accomodate printing requirements.]

School: Pine Glen
Type of Evaluation: Full

EDUCATIONAL PLAN: GENERAL AND SPECIFIC OBJECTIVES/ DELIVERY OF SERVICES

1. Name: MICHAEL PANICO Date of Birth: 9-7-70
Address: 28 Fieldstone Drive City: Burlington

2. Participants:

Name	Position	Name	Position
Jean Arin		Beck Silverstein	
Richard Cavanaugh		Mrs. Hennessey	
Patricia Meade		Mr. and Mrs. Panico	
Katherine Black		Myra Fournier	
Gail Mason			

3. This Educational Plan covers the period June, 1979 to June, 1980.

4. General Objectives:

Based on the various demonstrated performances as indicated by the assessments, what are the general long term (one year) objectives for the student?

Pd. No.	
1	To attain grade level reading skills.
2	To apply mastered phonetic skills to reading.
3	To increase visual memory for sight vocabulary.
4	To continue to develop decoding and encoding skills of affixes.
5	To develop oral reading fluency.

6 To increase auditory and visual sequential memory processing skills.
7 To continue academic growth in all subject areas — spelling, math, written and oral.
8 To improve handwriting skills.
9 To improve understanding of directionality.
10 To increase self-confidence in academic areas.
11 To be able to express feelings.
12 To improve attention span and diminish distractibility.
13 To develop positive independent work habits for task completion.

MICHAEL PANICO

Learning Style/Physical Constraints
Provide information relevant to the instruction and attainment of objectives

Michael is an 8 year, 5 month old boy in the third grade. His general mental ability has been measured as "high average" or "superior" on various assessments with no significant differences noted between his verbal and non-verbal scores. Testing indicates adequate performance in expressive and receptive language processes. In most areas, he scored above his chronological age with the one exception of auditory attention span for unrelated words on which he scored 7 years 9 months. Michael performs satisfactorily in a third grade classroom; however, he has difficulty remembering on a day-to-day basis skills previously taught. Although Michael's oral reading is slow and labored, he demonstrates the ability to use context clues for self correction and is able to comprehend main ideas and details from selected passages. Limited sight vocabulary hinders oral fluency for appropriate level reading materials. Michael relies on word configuration rather than focusing on

letters. Michael's visual integration problem causes him difficulty in processing the syllable into a whole; thus, his weak visual memory for whole words limits his word recognition skills. Although Michael's short term visual memory task performance is good (exposure time up to 10 seconds) a longer exposure time results in poorer visual memory performance. He presently is unable to use his word attack skills spontaneously. Because of his distractibility and limited attention for task completion, supervision is necessary for successful completion of prescribed tasks. Activities fostering the development of independent work habits should be encouraged. Michael enjoys reading material relating to animals. Michael's handwriting needs continued reinforcement for neatness and form.

Michael has a positive self image regarding his body and competence in sports activities. However, Michael perceives that adult and peer expectations for academic performance are beyond his reach. The perceived negative attitudes concerning academic competence, contribute to his questioning his self worth and cause him to become anxious, sad and angry. The cycle of negative attitudes and feelings cause depression and results in Michael's difficulty to focus attention on tasks and to exert sufficient energy for task completion to meet with success.

MICHAEL PANICO

Learning Style/Physical Constraints (continued)
Michael uses defense mechanisms of distantiation, repression, and denial to avoid dealing with the perceived conflicts. Thus, he becomes more demanding and critical of himself, and questions his self worth. Michael is presently being medicated for migraine headaches under the care and treatment of Dr. Lott, Mass General Hospital.

Counseling support and a comfortable supportive small group environment will be necessary to assist Michael in diminishing his negative feelings related to school work. Materials should be presented in non-timed success insured segments to assist Michael in developing academic confidence. A multisensory approach to reading with much repetition and drill to compensate for the visual memory integration problem will be helpful. Tasks that appear to Michael too difficult should be broken down in step by-step deliberate order to diminish impulsive and wholistic responses and to diminish personal frustrations.

[This page is intentionally left blank.]

			6.1		6.2	
			CORE EVALUATION TEAM			
Pd. No.	Spec. Obj. #	Specific Objectives	Quarters (12 Mo. Yr.) i.e., 3 Mo. Intervals	Class	Small Group	Individual
1-	1	To continue syllabication skills.			X	X
	2	To develop more speed in word attack.			X	X
	3	To foster stronger phonetic application in word attack.			X	X
	4	To review suffixes, prefixes, and endings.			X	X
	5	To reinforce short vowel sounds.			X	X
	6	To respond to questions containing 5 elements.			X	X
	7	Michael will be able to read without hesitation common phonetically regular words that are practiced on individual cards.				X
	8	Michael will read without hesitation words in isolation from the Dolch Sight Vocabulary list.				X
1-4	1	Michael will be able to answer questions on literal, informational and critical level from reading appropriately selected materials				X

8.1		8.2		8.3
ADMINISTRATOR OF SPECIAL ED./DESIGNEE				
Reg.	Prog. Spec.	Start Date Mo. Day Yr.	Service Provider	Location
	X	9/79	John McAleer	Pine Glen
	X	"	"	"
	X	"	"	"
	X	"	"	"
	X	"	"	"
	X	"	"	"
	X	"	"	"
	X	"	"	"
	X	"	"	"

6.1 6.2

CORE EVALUATION TEAM

Pd. No.	Spec. Obj. #	Specific Objectives	Quarters (12 Mo. Yr.) i.e., 3 Mo. Intervals	Class	Small Group	Individual
1-6	1	Michael will read aloud stories concerning animals and nature and high interest materials				X
	2	Michael will orally answer questions pertaining to taped stories in correct sequence.				X
	3	Michael will choose words to learn spontaneously from language experience stories.				X
6	1	Michael will appropriately sequence from tapes, pictures of story.				X
	2	Michael will be able to illustrate a story in sequential order after silently reading appropriately selected materials.				X
	3	Michael will be able to orally present a story in correct sequence after reading appropriate passage.				X
7	1	Michael will learn to spell common everyday words by saying, tracking, and writing them as he says them.				X
	2	Michael will complete all assignments for subject areas presented.				X
	3	Michael will be able to produce and understand different sentence types (declarative, interrogative, imperative, question.)			X	X
	4	Michael will be able to include appropriate grammatical elements within sentences of different types			X	X

8.1		8.2		8.3
ADMINISTRATOR OF SPECIAL ED./DESIGNEE				
Reg.	Prog. Spec.	Start Date Mo. Day Yr.	Provider	Service Location
	X	9/79	John McAleer	Pine Glen
	X	"	"	"
	X	"	"	"
	X	"	"	"
	X	"	"	"
	X	"	"	"
	X	"	"	"
	X	"	"	"
	X	"	"	"
	X	"	"	"

6.1 6.2

CORE EVALUATION TEAM

Pd. No.	Spec. Obj. #	Specific Objectives	Quarters (12 Mo. Yr.) i.e., 3 Mo. Intervals	Class	Small Group	Individual
8	1	Michael will be able to form his letters with more precision and neatness.				X
9	1	Michael will work on left right progression skills in fine motor tasks.				X
	2	Michael will work on left/right tracking skills.				X
10 12	1	Michael will be able to develop a positive self-image regarding his strengths.			X	X
	2	Michael will be able to identify situations that cause frustrations.				X
	3	Michael will develop skills in paying attention during a small group lesson for a period of 15 minutes.				X
13	1	Michael will be able to follow simple written directions independently on a worksheet.				X
	2	Michael will work independently on reading worksheets with no assistance for task completion — up to 10 min.				X

8.1		8.2		8.3
ADMINISTRATOR OF SPECIAL ED./DESIGNEE				
Prog. Reg.	Prog. Spec.	Start Date Mo. Day Yr.	Service Provider	Location
	X	9/79	John McAleer	Pine Glen
	X	"	J. LeVasseur Adapt. P.E.	Pine Glen
	X	"	"	"
	X	"	"	"
	X	"	John McAleer	"
	X	"	"	"
	X	"	"	"
	X	"	"	"

Criteria (demonstrated skills) for student's movement to next less restrictive program prototype:

Formal and informal assessments will be carried out. When objectives have been met, a review will be held to determine placement in a less restrictive prototype.

Describe this student's transportation plan:

Special transportation to and from Pine Glen daily.

Designated liaison person, Name: John McAleer — Classroom teacher

Position:

If placement outside the LEA is recommended complete the following:

I certify that the (facility) _____ is able to provide the services required by this plan.

Signature: _____ Date: _____

(Director of Accepting Facility)

I certify that the above objectives are those recommended by the core evaluation team, and that the above indicated services will be provided.

Signature: /s/ Jean Arin Date: June 28, 1979
(Special Education Admin./Designee)

I certify that the above objectives are those recommended by the core evaluation team, and that the above indicated services will be provided.

Signature: _____ Date: _____

(Building Principal)

Response of Parents/Guardian/Student:

a. ☐ I accept the educational plan outlined above.

b. ☒ I DO NOT accept the educational plan outlined above.

c. Comments: _____ Date: 7/3/79

I understand that I may seek a second opinion or independent evaluation as provided in the Chapter 766 regulations.

Signature /s/ Robert A. Panico

(Parent/Guardian/Student)

STUDENT Michael Panico
SCHOOL Pine Glen
DATE OF PLAN September, 1979
COUNSELOR John McAleer/
Susan Cohen

ADDITION TO INDIVIDUAL EDUCATIONAL PLAN

PERFORMANCE LEVEL (What the student can do now):

Michael has a sight vocabulary of at least 200 words. He can recognize and divide multisyllablic words in written form. Michael is able to use the suffixes s, ed, ing, y, ly, ful, es, est, tion; he can use the prefixes re, un, dis, pre, non, mis, anti, in, and, im. Michael is able to skim reading passages to locate details and overview idea. He is able to understand the formation of plurals f to v, y to i, etc. Michael knows the vowel combinations ay, ai, ce, ou, er, is, or, ar.

Gen. Obj. #
TEACHING APPROACH AND METHODOLOGY (Tied to general objectives):

1-7 Combination of Basal Reading approach and Experiental Language Based program.
Multisensory approach.
Positive reinforcement token system.

Gen. Obj. #
SPECIALIZED MATERIALS AND EQUIPMENT (If indicated):

Scott Foresman Reading Series.
Explore the Code — Educators Publishing Code
Tape recorder: Record Player and accompanying books.
Developmental learning materials for academic areas.
Teaching Resource Materials.
Teacher made materials.

STUDENT Michael Panico
SCHOOL
DATE OF PLAN
COUNSELOR

ADDITION TO INDIVIDUAL EDUCATIONAL PLAN

PERFORMANCE LEVEL (What the student can do now):

Silvaroli Informal Reading Inventory
Word Recognition — 80%
Primer — 85% 1.2 — 75%; 2.0 — 65%
Oral Reading Accuracy
Preprimer — 83%, Primer 88%, 1.2 — 85%, 2.0 — 84%
Comprehension Primer 805;
1.2 — 90% 2.0 — 100% 3.0 — 60%
(See attached)

Gen. Obj. #
TEACHING APPROACH AND METHODOLOGY (Tied to general objectives):

Gen. Obj. #
SPECIALIZED MATERIALS AND EQUIPMENT (If indicated):

PHYSICAL EDUCATION: Can student participate in regular physical education program? _____X_____yes _____no.

If not, what adaptations have to be made or what program will be offered?

PARENT-STUDENT INSTRUCTION (if indicated). NOTE: Parent-student instruction is required for three and four year old students.

METHODS AND CRITERIA TO MONITOR STUDENT PROGRESS:

Special Summary Reports
Quarterly Reviews
Educational Plan Objectives
Parent Monthly Meetings
Ongoing assessments for progress.

FOR STUDENT PLACED IN 502.4 PROGRAM, INDICATE THE ACTIVITIES TO BE USED FOR INTEGRATION INTO A REGULAR EDUCATION PROGRAM.

Music, Art, Gym, Lunch, Recess

SUPPORT SERVICES PROVIDED DIRECTLY TO REGULAR CLASSROOM TEACHER OR SPECIAL EDUCATION PROVIDER (AND RELATIONSHIP TO OBJECTIVES:)

All special subject areas will be informed of Michael's particular learning style.

Performance Level (continued)

Social Studies — SRA "Cities" and Tapes — Grade Level
Science — Grade Level
Math — Level 3 — Grade Level
Handwriting — Continue work for neatness and form.

PIAT —
Mathematics — 3.3 Grade Level
Reading Recognition — 2.6 Grade Level
Reading Comprehension 2.5
Spelling — 2.3
General Information 4.0
Total Test 2.8 Grade Level

Bender — No visual motor problems evident
Scored age appropriate

Wepman Auditory Discrimination Test
2 errors — adequate discrimination skills

Spencer's Memory for Sentences — 8-6 month age equivalent

G-F-W — Auditory Memory Tests
Test I — Recognition Memory
Raw — 104/110; % Rank - 70% — Age Equiv. - 10.10

Test II — Memory for Content
Raw — 24/32; % Rank — 82% — Age Equiv. - 12-11

Test III Memory for Sequence
Raw 38/84; % Rank - 25% — Age Equiv. - 7-7

ITPA
Overall language Score — Age Equiv. 10.1.
Auditory vocal; visual vocal 8 yrs. 6 mo.

Subtests of the Detroit Test of Learning
Aptitude — Above Chronological Age with the exception of the Auditory Attention Span for unrelated words at 7-9

	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
7:30					
8:00					
8:30	Homeroom				
9:00	Math				
9:30	Reading →	→	→	→	→
10:00	↓				
10:30	Adapted P.E.	Reading & Lang.			
11:00		Gym		Gym	
11:30	Lang →	→	→	→	Adap. P.E.
12:00					
12:30	Lunch →	→	→	→	→
1:00					
1:30	Social Studies →	→	→	Art	Home-work Activities
2:00	Behavioral Activities →	→	Science	Art	Behavioral Activities
2:30					

1. Daily duration of program 8:30-2:45
2. Actual times each week when services will be delivered Daily
3. Duration and frequency _____
4. The number of days per year that this plan will be in effect 180

[BSEA Exhibit, found at R.A. IV, p. 148.]

BURLINGTON PUBLIC SCHOOLS
BURLINGTON, MASSACHUSETTS

June 28, 1979

Mr. and Mrs. Panico
28 Fieldstone Drive
Burlington, Mass. 01803

Dear Mr. and Mrs. Panico.

Enclosed is the Educational Plan for Michael for the academic year 1979-80. I am sorry you were unable to keep the appointments arranged to view the classroom and meet with John McAleer at the Pine Glen School.

To date, Dr. Lott's evaluation from Mass General has not arrived. We were awaiting the Mass General reports before completing our Educational plan; however, we will be happy to review and include any additional objectives deemed appropriate for Michael's educational program at the Pine Glen School upon receipt of the Mass General assessments.

Please sign the enclosed plan and return to our office at your earliest convenience. If you have any questions, please feel free to call.

Sincerely,
/s/
Jean Arin
Core Evaluation
Administrator

JA:lt
Enclosures
cc: Kevin Foley

[BSEA Exhibit, found at R.A. IV, pp. 163 and 510.]

BURLINGTON PUBLIC SCHOOLS
BURLINGTON, MASSACHUSETTS

July 6, 1979

Carol Kervick
Division of Special Education
Bureau of Appeals
31 St. James Avenue
Boston, MA 02116

Re: Michael Panico

Dear Ms. Kervick,

Enclosed is the Educational Plan for Michael Panico, son of Mr. and Mrs. Robert Panico, 28 Fieldstone Dr., Burlington, Mass. telephone no. 272-7583.

The parents have rejected the Educational Plan as submitted to them.

Sincerely,
/s/
Jean Arin
Core Evaluation
Administrator

JA:lt
Enclosures
cc: Kevin Foley
Mr. and Mrs. Panico
Madeline Mooney

[BSEA Exhibit, found at R.A. IV, p. 362.]

HARVARD MEDICAL SCHOOL
PEDIATRIC NEUROLOGY UNIT
MASSACHUSETTS GENERAL HOSPITAL
BOSTON, MASS. 02114

July 10, 1979

Mr. Robert Panico
28 Fieldstone Drive
Burlington, MA 01803

Dear Mr. Panico:

I have reviewed Michael's cortical function tests and discussed his problem with Ms. Schonfeld and Dr. Eisenthal. We are all of the opinion that Michael's emotional difficulties are secondary to a rather severe learning disorder characterized by perceptual difficulties. The treatment would not seem best centered in a class for emotionally disturbed youngsters, but rather in a highly specialized setting for children with learning handicaps. The severity of Michael's deficit may require a special setting such as the Carroll School for this purpose.

Yours sincerely,
/s/
Ira T. Lott, M.D.

ITL/ljc

[BSEA Exhibit, found at R.A. IV, p. 410. The original was handwritten.]

7/19/79 File Michael Panico

Betsy Burch

Bureau Spe. Appeals

727-8534

Is there a need for [Mediation]

should go to Hearing without

Med session

[BSEA Exhibit, found at R.A. IV, p. 525.]

Robert A. Panico
28 Fieldstone Dr.
Burlington, Mass.

7/17/79

Division of Special Education
31 St. James Avenue
Boston, Mass. 02116

Gentlemen:

I am requesting a hearing relative to Case #2867 concerning my son, Michael R. Panico. Michael is a student at Memorial School, Burlington, Mass. I understand that the hearing will be scheduled within 20 days of receipt of this request.

I rejected the I.E.P. proposed for my son by the Burlington School Department and so notified them.

I spoke with Betsy Burch on 7/17/79 and a mediation session will not be held.

Very truly yours,
/s/
Robert A. Panico

[BSEA Exhibit, found at R.A. IV, p. 363.]

MEDFORD PEDIATRIC ASSOCIATES, P.C.
116 FOREST STREET
MEDFORD, MASS. 02155

July 25, 1979

To Whom It May Concern:

Re: Michael Panico
DOB: 9/7/70
28 Fieldstone Drive
Burlington, MA

Dear Sir:

I am the Pediatrician following Michael Panico. Michael has a significant learning disability with secondary emotional problems. He has perceptual problems, which are responsible for his learning disability.

He needs specialized instruction for his language disorder such as is provided at the Carroll School. His behavioral problems are secondary to his primary learning disabilities and he should not be placed in a class for emotionally handicapped children.

Sincerely,
/s/
Melvyn B. Levine, M.D.

MBL/mab

[BSEA Exhibit, found at R.A. IV, p. 527.]

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION —
DIVISION OF SPECIAL EDUCATION
NOTICE OF HEARING

7/30/79

TO: Parents and Local School District
FROM: Bureau of Special Education Appeals

G.L. 72B, Chapter 766 Regulations, Paragraph 401.3

IN RE: Michael Panico #2867

SCHOOL DISTRICT: Burlington Public Schools

A hearing, under Massachusetts General Laws, Chapter 71B ("Chapter 766"), has been requested regarding the above named student. The hearing has been scheduled as shown below:

DATE: August 8, 1979 (Wednesday)

TIME: 9:00

LOCATION: Center School

ADDRESS: Center Street
Burlington, Mass

If you desire to request a postponement, cancellation, or change of location of the hearing, you must follow the instructions contained in the Bureau of Special Education Appeals Statement on Postponements of Appeals Hearings. A copy of that policy has been included with this notice for your convenience.

For your reference we have enclosed a copy of The Bureau's Guide to the Appeals Process. If you have any questions about the scheduling of the hearing or about the hearing process itself, kindly call the Bureau at (617) 727-8534.

[BSEA Exhibit, found at R.A. IV, p. 364.]

HARVARD MEDICAL SCHOOL
PEDIATRIC NEUROLOGY UNIT.
MASSACHUSETTS GENERAL HOSPITAL
BOSTON, MASS. 02114

August 1, 1979

Mr. Robert Panico
28 Fieldstone Drive
Burlingham, MA 01803

Dear Mr. Panico:

This note will support our recommendation that Michael receive intensive tutorial for his learning disabilities which are severe. The history of his current school performance and the extent of disabilities revealed through cortical function testing suggests that an advanced program at an institution such as the Carroll School will be necessary. The enclosed note from Dr. Eisenthal suggests that any emotional difficulties Michael may be experiencing result from his learning disabilities rather than the converse.

Yours sincerely,
/s/
Ira T. Lott, M.D.

ITL/ljc

[BSEA Exhibit, found at R.A. IV, pp. 183-184.]

August 14, 1979

Administrative Office
Burlington Public Schools
Center School
Center Street
Burlington, Massachusetts 01803

Att: Mr. Thomas Michael
Superintendent of Schools

Re: Michael Panico

Dear Superintendent Michael:

Enclosed please find copy of a letter with enclosures of August 14, 1979 to the Bureau of Special Education Appeals. I think that the enclosures should be most useful at the mediation session set for August 17, 1979.

I especially invite your attention to:

1) "Medical Examination Summary" in which as early as June 1977, Doctor Levine indicated dyslexia. Unfortunately no special programs were instituted at the time.

2) Letters of, July 10, 1979, from Doctor Lott; July 25, 1979, from Doctor Levine; and of August 1, 1979 from Doctor Lott enclosing a report of Doctor Eisenthal.

If you have no objection, at the insistant request of the Panicos, Mrs. Kathryn Black is willing to attend the mediation session

and give what assistance she may. Inasmuch as Mrs. Black has had considerable first hand knowledge of Michael's condition, and training and experience in the field it would seem appropriate that she attend.

Permit me to say that I am looking forward to meeting you on Friday, and am sure that both as an educator and a gentleman you will use your best efforts to resolve this aggravated matter.

Very truly yours,
/s/
Gerald B. Gallagher

GBG:scm
Enclosures

[BSEA Exhibit, found at R.A. IV, p. 562.]

Division of Special Education

The Commonwealth of Massachusetts Department of Education

31 St. James Avenue, Boston, Massachusetts 02116

BSEA CASE # 2867

RECORD OF ATTENDANCE

In a mediation session held with Madeline Mooney, mediator of the Bureau of Special Education Appeals on 8/17/79 to discuss the educational program and plan for Michael Panico, the following people were present:

NAME	ADDRESS*	POSITION/TITLE
Robert A. Panico	28 Fieldstone Ave. Burlington	Father
Rosann I. Panico	" " "	Mother
Gerald B. Gallagher	77 Great Road, Acton	Attorney for Panicos
Kevin Foley	Center School, Burlington	Director of Pupil Services
Jean Arin	Center School Burlington	Core Evaluation Adm.
Kathryn Black		

[BSEA Exhibit, found at R.A. IV, p. 553.]

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION —
DIVISION OF SPECIAL EDUCATION
NOTICE OF HEARING

Sept. 7, 1979

TO: Parents and Local School District
FROM: Bureau of Special Education Appeals

G.L. 71B, Chapter 766 Regulations, Paragraph 401.3

IN RE: Michael Panico #2867

SCHOOL DISTRICT: Burlington Public Schools

A hearing, under Massachusetts General Laws, Chapter 71B ("Chapter 766"), has been requested regarding the above named student. The hearing has been scheduled as shown below:

DATE: Wednesday Sept. 26, 1979

TIME: 9:00 AM.

LOCATION: North Andover Public Library

ADDRESS: Main Street
North Andover, Mass

If you desire to request a postponement, cancellation, or change of location of the hearing, you must follow the instructions contained in the Bureau of Special Education Appeals Statement on Postponements of Appeals Hearings. A copy of that policy has been included with this notice for your convenience.

For your reference we have enclosed a copy of The Bureau's Guide to the Appeals Process. If you have any questions about the scheduling of the hearing or about the hearing process itself, kindly call the Bureau at (617) 727-8534.

[BSEA Exhibit, found at R.A. IV, p. 560.]

October 12, 1979

Ms. Debra Blumer, Hearing Officer
Bureau of Special Education Appeals
31 St. James Avenue
Boston, Massachusetts 02116

Re: Michael Panico
Burlington Public Schools
No. 2867

Dear Ms. Blumer:

I received a call from Attorney David Berman last evening asking to have the above-captioned matter continued from October 17 because of his engagement with a Superior Court matter. I indicated to Mr. Berman that I had no objections to this.

Mr. Berman indicated that he was free and would reserve October 30, 31, and November 1 for the Panico case. It is my opinion that this case will go more than one day and it may be fortuitous that at this time both Mr. Berman and myself are available for all three of those days.

However, a further continuance in this matter would be quite onerous on my clients, inasmuch as they will be required to pay the second half tuition at the Carroll School by a certain day in December. To do this they will be required to get a loan.

I certainly hope that all parties recognize the anxiety that the delay in this case necessarily causes the Panico family.

Very truly yours,
/s/
Gerald B. Gallagher

GBG:rip
cc: David Berman, Esq.

[BSEA Exhibit, found at R.A. IV, p. 561.]

October 15, 1979

Ms. Debra Blumer, Hearing Officer
Bureau of Special Education Appeals
31 St. James Avenue
Boston, Massachusetts 02116

Re: Michael Panico
Burlington Public Schools
No. 2867

Dear Ms. Blumer:

This is to confirm our phone conversation of October 15 and to inform Attorney David Berman of the scheduling on this case. Mr. Berman has informed me that he is available on October 30, October 31 and November 1.

It is my understanding that we are now to reconvene on October 30 at 1:00 p.m. We will also reserve a full day on October 31, and the afternoon of November 1 from 1:00 p.m. on.

Again, I reemphasize the very real personal need of the Panicos of disposing of this matter with no further delay.

Very truly yours,
/s/
Gerald B. Gallagher

GBG:rip
cc: David Berman, Esq.

[The written statement of Mr. Panico, a BSEA Exhibit, found at R.A. IV, pp. 415-425.]

My son Michael is a 9 year old boy and has completed grades K through 3 at the Memorial School in the Burlington School System. Presently Mike has a severe learning disability which has manifested itself in his school work.

Mike's learning disability was first noticed by us early in Grade 1 and brought to the attention of his teacher Beverly Reber. Ms. Reber dismissed our concern stating that Mike was just "immature."

In December 1976 at a parent-teacher conference we asked Ms. Reber if Mike could be tested to determine if he had a learning problem. Ms. Reber informed us that she did not know of any testing available for a child of Mike's age but she would look into it and get back to us. She also told us that it was too early to tell if Mike should repeat but if he didn't improve in reading she might have to recommend repeating.

In March 1977 at a parent-teacher conference we were informed by Ms. Reber that Mike was doing poorly in school and she was going to recommend repeating him. She said repeating would be best for Mike because of his immaturity which caused him to be deficient in his school work. We again asked about testing for Mike. Ms. Reber said she had looked into it but there was nothing available.

In May 1977 we had Mike tested by an experienced first grade teacher from another school system (Janet Ruggerio) who stated that it was her professional opinion that Mike had some kind of a learning disability. We told Mrs. Ruggerio about Mike's teacher stating that there was no testing. Mrs. Ruggerio told us the teacher was wrong and informed us of Chapter 766.

On or about June 1, 1977 we received a letter from the principal (Richard Barrows) at Mike's school recommending that Mike be retained in Grade 1.

On June 3, 1977 I went to speak to Mr. Barrows concerning Mike. I explained my feelings that Mike had a learning disability and the reasons why. Mr. Barrows stated that he has no learning disability but is only immature. I requested a full CORE for Mike and he said he would not give him one. He told me to take his advice and repeat Mike.

I again requested a full CORE and Mr. Barrows replied, "No, way". I then said I was demanding a full CORE for my son. He then stated that if I wanted a CORE he would "wash his hands" of Mike. I insisted on a full CORE and he told me I would have to do it myself. He gave me the name of Jean Arin and told me she was in charge of CORE's.

I requested a full CORE in writing on June 3, 1977. I also called Jean Arin who said she would set up the CORE at once. My wife went to the Burlington School Administrative Office and signed the necessary papers. On this date, we received copies of several documents. One of the documents we received was entitled "Evaluation Process-Rights of Parents. This document was one page. (During the course of my problems with the Burlington School Department I have come to learn that this document should have detailed what my rights were and what we were to expect from the full CORE).

The CORE testing was done and a CORE conference was held on June 23, 1977. As part of the CORE testing Mike was examined by Doctor Melvyn Levine who was Mike's pediatrician. He diagnosed Mike has having dyslexia.

At this conference the CORE team agreed that Mike had some form of a learning disability but no one offered anything specific. My wife and I were told that Mike would receive special help for his learning disability the following year whether he repeated grade 1 or we placed him in grade 2.

At the conclusion of this conference we were satisfied that Mike would get special help in school for his learning disability. We were not aware, nor were we informed of the requirement that an Educational Plan should have been prepared.

At this point we had made no decision as to whether or not Mike should repeat grade 1. During the summer of 1977 at our expense Mike was tutored in reading by Janet Ruggerio.

In early September 1977 prior to the commencement of school Mike was tested in reading at the Memorial School. He had shown significant improvement in reading and we placed him in the second grade. I called Mr. Barrows prior to the start of school and advised him of our decision. I asked him if Mike would get the special help as stated at the CORE and Mr. Barrows said, "Yes".

In October 1977 we went to see Mike's reading teacher Mrs. Hannon at the parent-teacher open house. After we introduced ourselves to Mrs. Hannon, her first words were, "Don't you feel you've made a mistake by putting Michael in the second grade." She then told us that Mike couldn't do second grade work. She said Mike was immature, evidenced by the fact that he didn't complete his assignments, had to ask for directions several times, had a short attention span and was fidgety.

We asked the teacher if she was aware that Mike had a learning disability and she said "No". She said she didn't see a learning disability. We asked her if she read Mike's file and the CORE results and she said "No". We asked what special help Mike was getting and she said she wasn't aware of any. We asked her to please look at Mike's file. She agreed and told us that if Mike had a CORE she would make sure he got the necessary special help.

In November 1977 at a parent-teacher conference Mrs. Hannon told us that Mike was her poorest student, unable to do the work and needed constant help. She suggested we place Mike back in Grade 1. We again told Mrs. Hannon about Mike's learning disability and asked if she had looked at Mike's folder and the CORE results. She said that she hadn't but had discussed Mike with the principal who told her that Mike was

immature and should have been repeated and that he had explained that to Mike's parents last year.

I asked Mrs. Hannon to please get Mike's school folder so we could review it together. Mrs. Hannon said she had another appointment scheduled but promised to review the folder and set up another appointment soon. (We never heard from Mrs. Hannon until we initiated a conference in February or March 1978.)

In October and November 1977 Mike began to suffer from severe headaches waking with nightmares, screaming in his sleep that his teacher said he was stupid and that she was going to send him back to kindergarten.

As a result of the above we took Mike to his pediatrician Dr. Levine. Subsequent to Mike's examination Dr. Levine told us he wanted to refer Mike to Dr. Ira Lott, a pediatric neurologist at the Massachusetts General Hospital, for his headaches and night tremor [*sic*]. He also told us that Mike had a severe learning disability.

In late December 1977 Mike was given a complete neurological examination by Dr. Lott. Dr. Lott told us that Mike had severe pediatric migraine and a rather severe learning disability. We told Dr. Lott about what had happened in the Burlington School System. He then recommended that Mike be tested at the Massachusetts General Hospital. On January 9, 1978 Michael underwent a full day of testing. During the afternoon of the testing during a break the tester told us that Mike was a very bright child but had a learning disability.

On March 2, 1978 my wife and I met with Mrs. Hannon, Mike's teacher. We told her of the Massachusetts General Hospital preliminary findings and told her of Mike's nightmares and night tremors. We asked her to please ease up on Mike and try to build him up. She adamently refused and said she certainly didn't cause his problems and couldn't waste precious time on Mike. She said Mike's headaches are an

excuse. We explained that we weren't concerned with the cause of Mike's problem at that time but rather were asking her to be a little understanding of the fact that he has been having headaches and was fearful of school and her.

Mrs. Hannon left the room and returned with Mr. Barrows. He immediately asked if we wanted Mike taken out of Mrs. Hannon's room. We explained the problem to him and he stated he had nothing in writing and until he did he wouldn't do anything. I then asked Mr. Barrows why Mike didn't get special help as was stated at the CORE meeting the previous June. Mr. Barrows stated that he wasn't aware Mike had a CORE. (Mr. Barrows sat in at the CORE meeting). Mr. Barrows then stated if the doctors diagnosed Mike as having a learning disability they are wrong. He said they see someone for a day while I see them all year. Mike hasn't got a learning disability. He is just immature.

On March 7, 1978, we met with Dr. Lott relative to Mike's cortical function test results. Dr. Lott explained the results and suggested we go to the School Department to get special help for Mike. We explained to Dr. Lott what had happened on March 2, and he said if we ran into difficulty he would help us get the necessary help for Mike.

Subsequent to this meeting I asked Burlington to reconvene the CORE. This was done on March 17, 1978. At this meeting it was agreed that Mike had a learning disability and that an educational plan would be developed and instituted calling for Mike to receive one hour tutorial, one on one with Katherine Black a reading specialist. This plan was received by us on or about April 5, 1978. It covered the period 3/23/78 to 3/23/79. The plan was implemented immediately after we signed it in early April 1978.

During the period April 1978 through June 1978 Mike seemed to improve considerably. His headaches eased and he was eager to try reading and spelling. He was more relaxed at

home and in school. The nightmares and night tremor stopped. This improvement continued during the summer of 1978. During the summer Mike received tutorial help from Mrs. Black on a regular basis, at no expense to us. Mrs. Black tutored Mike at her own expense. She informed us that if she could work with Mike over the summer it would help him maintain what had been learned.

On August 16, 1978 I met with Kevin Foley, Director of Pupil Services for Burlington. I told Mr. Foley about Mike and his problems and related the experiences that I had had during the past year and a half relative to obtaining help for Mike. I expressed my concern for other children in the school system whose parents might not have been able to afford the testing at the Massachusetts General. I also asked Mr. Foley if he would insure that Mike got the help he needed. He promised me that Mike would get the help specified in the Educational Plan. He further stated that no change would be made in Mike's Educational Plan without my consent.

In September 1978 Mike began third grade. His previous Educational Plan was still in effect.

Almost immediately Mike started becoming frustrated about school. He complained about too much work. He said he had to work with Mrs. Black (reading tutor) and then go back to his class and do the work he had missed while with Mrs. Black. To make up the additional work he was forced to miss recess, etc.

At the first CORE team meeting September 19, 1978 we brought the above problem to the attention of the CORE team. Mike's regular classroom reading teacher was not aware that Mike couldn't do regular third grade reading and that he was not supposed to be making up the work he missed while being tutored by Mrs. Black. This situation was corrected. We were told at this meeting that Mike was progressing well.

During the remainder of the third grade school year we received reports that Mike's education was going well.

In May 1979 my wife and I became concerned because Michael seemed to be regressing. He didn't want to go to school, the headaches became worse and the night tremors began to recur. We spoke to Mrs. Black who informed us:

1) that Michael was not making significant progress.
2) that Michael's educational plan had been changed early in the school year. The change reduced Michael's time alone with Mrs. Black from one hour per day to thirty minutes per day.
3) that she (Mrs. Black) spoke to the Burlington School Administration about the change and the fact that it was wrong, but received no satisfaction.
4) that in her opinion Michael was now at a point where he needed a total program which was directed solely toward learning disabilities.

In mid-May we requested that Michael be retested under 766 so that we could see where Mike stood.

On May 18, 1979 we met for a quarterly CORE meeting. Several of Mike's test results were discussed. Two of the team members, Ms. Meade and Ms. Mason were concerned with Mike's ability to remember. They both diagnosed that Mike had a memory problem that interfered with his learning. No decision as to the education of Mike was made or discussed by the TEAM.

Subsequent to this meeting I and my wife discussed Michael's problems with Ms. Meade and Ms. Mason. These discussions were in the presence of both Ms. Meade and Ms. Mason and also alone with Ms. Meade and Ms. Mason.

During these discussions either Ms. Meade or Ms. Mason and we can't remember which told us:

1) that we should look into a private school which specializes in learning disabilities because Burlington hasn't been able to help Mike. Several schools were mentioned including the CARROLL and LANDMARK Schools.
2) that Michael's educational plan has been changed without our consent.

In late May 1979 Jean Arin called me to set up an appointment to meet with her and the school psychologist on May 25, 1979 at the Center School.

On May 25 my wife and I met with Jean Arin and Richard Cavanaugh. Mr. Cavanaugh gave us the results of his testing of Michael. Mr. Cavanaugh told us that Mike was extremely depressed and anxious and had severe emotional problems and because of this he couldn't learn. I asked Cavanaugh if the emotional problems were the cause or the result of Mike's learning problem and he stated that they were the cause.

During this meeting Ms. Arin said that because Mike had such severe emotional problems Mike's educational plan would call for him to be placed in a class for emotional children at the Pine Glen School. She told us that this class was run by John McAleer and that he was a superb teacher who was trained in this field. She said he worked wonders with children with emotional problems by building up their egos.

I asked about special help for Mike's reading problems and she said McAleer would handle this but once Mike overcame the emotional problems he wouldn't need special help in reading. She explained that because of his anxiety he couldn't learn.

At this meeting Jean Arin stated as follows:

The Memorial School wasn't for Michael. Michael has what we call the "Memorial School Syndrome." Barrows' is only interested in the achievers. I wanted to get Mike out of there before, but couldn't without a reason. Now with Mr. Cavanaugh's report I can get him in another school.

Cavanaugh left for another appointment and we continued our discussion. Mrs. Arin spoke at great length about John McAleer and what a great job he does with kids with problems. She suggested that we bring Mike to McAleer's class the following week so we and Mike could meet McAleer and get to know him before Mike starts there next year.

At this time I told Mrs. Arin that I was extremely concerned about Mike, based on Cavanaugh's report and that I wanted other opinions, since this emotional problem was so serious. I told Ms. Arin that I wanted additional testing done on Mike and I wanted it coordinated by Dr. Lott.

On May 29, 1979 Mike was examined by Dr. Lott and Dr. Lott was shown the school's psychological report. Dr. Lott stated that he thought the school psychologist was in error. He said that any depressions Mike might be having was a result and not the cause of a learning disability, and that Mike should not be put in a class for emotional children. Dr. Lott referred Mike for additional psychological testing to Sherman Eisenthall and forwarded Mike's tests, etc., to Gida Schonseld [*sic*] at the Learning Disorders Unit of the Massachusetts General Hospital.

Subsequent to this Dr. Lott recommended that Mike be placed in a school specializing in learning disabilities.

On June 4, 1979 a full CORE team meeting was held. At this team Mr. McAleer was present. Jean Arin stated that Mike was going to be placed in John McAleer's class at the Pine Glen School based on the school psychologist's report. There was no input by any team member relative to Mike's I.E.P. The decision had been made prior to the team meeting based on the psychologist's report. On this date I informed Ms. Arin that I was going to reject this educational plan until such time as I could get an opinion from Dr. Lott and Dr. Eisenthal as to the suitability of placing Mike in a class for emotional children.

On June 15, 1979 I called Jean Arin's office because I had not received an educational plan. I told her secretary I was going away for a week, but my wife would be home. Please send the educational plan so we could show it to Dr. Lott and decide what to do.

On June 27, 1979 I again called Jean Arin's office. I demanded the educational plan and told them it was late and I had to have it because I did not agree with their placement and wanted a hearing.

Jean Arin called me and said she was sorry the educational plan was late but it would be ready tomorrow. I told Arin what Dr. Lott and Eisenthall had stated, secondary emotional problems resulting from a learning disability, and this certainly didn't call for placing Mike in a class for emotional children, but rather placing Mike in a program directed toward a learning disability. I also told Ms. Arin that Mrs. Black, Mike's learning disability teacher from Burlington, also stated that Mike needed help for a learning disability and felt that placing Mike in McAleer's class would be detrimental to Mike. Ms. Arin said that she didn't agree with Mrs. Black or the doctors and would prepare the educational plan calling for Mike to be placed in McAleer's class.

On June 28, 1979 my wife picked up the educational plan from Ms. Arin. After a thorough review of the educational plan I rejected it on July 3, 1979.

On July 17, 1979 I contacted Betsy Burch, Bureau of Special Appeals to get a date for mediation. She told me she would call the Burlington School Department for a date. She called me back and told me Burlington didn't want to mediate and that I should request a hearing which I did that day.

On several occasions during the end of July and early into August I attempted to meet with Mr. Michael, Superintendent of Schools to try and correct the problems, but never was able to. Mr. Michael was too busy on three different days but finally agreed to meet with me subsequent to my retaining counsel.

During the period covering September 1976 to September 1979 Mike went through an ordeal no young child should ever have to go through.

In first grade (76-77) he was categorized as immature and not trying. His teacher and principal refused to even consider the fact that he might have a learning disability. School became a chore and he considered himself a failure. In grade 2 (77-78) he was categorized as a poor student, immature, not trying and a non-achiever. Although a learning disability was diagnosed and a full CORE was held in June 1977, he received no help. In fact, he was put under more pressure at school. He developed severe headaches, a fear of school, nightmares and night tremor. He began to develop emotional problems questioning his self worth. When problems were brought to the attention of his teacher and principal, they refused to help.

Finally after Mike was diagnosed as learning disabled by the Massachusetts General Hospital, an attempt was made to help him. An educational plan was developed on 3/23/78. For the remainder of the second grade Mike made good progress. His headaches diminished and his night tremor ended.

In the third grade Mike again began to develop more emotional problems. His night tremor returned. It must be noted that it was early in third grade when Mike's educational plan was reduced without parental knowledge or consent.

At the end of third grade an educational plan was recommended for Mike which would place him in a class for emotional children at the Pine Glen School. Mike knows the Pine Glen School as the school for "retards". He became scared and apprehensive when told in June that he might have to go to the Pine Glen School. He asked if he was retarded. He cried and pleaded with us not to send him there. He said the kids called him "wierdo" when he told them he might go there. He said he would run out of school and run away if he had to go to Pine Glen.

Almost on a daily basis during the summer he reiterated, "Where am I going to school?" "I'll go anywhere else but not Pine Glen." "You don't love me or you wouldn't make me go there."

The thought of where he was going to school dominated his thoughts day and night. He would awake from sleep crying and shaking and ask, where he was going to school.

Nothing that I or my wife said could allay his fears or ease his mind. Finally in mid-August 1979 my wife and I decided that we could not see our son hurt any longer and we made the decision to send him to the Carroll School, Lincoln, Massachusetts. We told Mike that he didn't have to go Pine Glen but would go to the Carroll School. Almost immediately the night tremor ceased. Mike relaxed somewhat and his headaches eased. After about a week he actually started looking forward to going to school and being helped in reading.

On September 7, 1979 Mike started at the Carroll School. Although he has only been there for about two weeks we can see a significant change in Mike. He comes home from school happy and excited. He talks about school and what he did during the day.

During this entire experience it must be noted that not only did Mike suffer but so did his family. His brother and sister felt guilty because they were excelling in school. We hurt each time our son hurt as only parents can. We expended funds which we didn't have because we saw our son being torn apart because an educational system broke down and the law was ignored.

In conclusion we must ask how all this happend and why.

/s/ Robert A. Panico
/s/ Rosann S. Panico

[Transcript of a portion of the administrative hearing held on September 26, 1979 before a Hearing Officer of the Bureau of Special Education Appeals of the Department of Education, Commonwealth of Massachusetts. The transcript includes a portion of the testimony of Mr. Robert Panico, the father of the child, a witness called by the parents, found in the Record Appendix, Volume III, pages 9-71. The complete transcript was offered as Plaintiffs' Exhibit 1 at the District Court Trial on May 14, 1982 at Tr. 2-37 (R.A. II, pp. 2-37.]

[9] TESTIMONY OF ROBERT PANICO

DIRECT EXAMINATION BY MR. GALLAGHER:

Q. Would you please state your name for the court?

A. Robert A. Panico.

Q. And where do you reside Mr. Panico?

A. 28 Fieldstone Drive, Burlington, Massachusetts.

Q. And how many children do you have?

A. I have three children, a daughter Jodeen who is 11, a son Michael who is 9, and a son Stephen who is 7.

Q. And where do you work?

A. I work for the Treasury Department as a supervisory criminal investigator.

Q. Is that in Boston?

A. Yes it is.

Q. And do you get home every evening practically?

A. Yes I do.

Q. So you are a full-time father?

A. Yes.

Q. Now I invite your attention to the Fall of 1976 when Michael was in the first grade and completed kindergarten.

A. Yes.

Q. In your documentation on page 43 you show his kindergarten report?

A. Yes I do.

Q. And does that kindergarten report indicate that he has difficulty putting concepts on paper?

A. Yes the kindergarten report entitled Exhibit 243 [*sic*] states "he seems to have some difficulty applying these concepts [10] to his paper work and completes work best if he is closely supervised. Learning to, reading to understand him verbally but having difficulty on paper — seeming to understand him verbally but having difficulty on paper.

Q. Now did you notice when he went into the first grade did you first notice reading difficulties in the Fall of 1976 yourself?

A. Yes we did.

Q. And in December of 1976 did you have a conversation with his first grade teacher Mrs. Reba [*sic*]?

A. Yes.

Q. And would you please tell the Hearing Officer what the gist of that conversation was?

A. Yes, in December 1976 my wife and I met with Michael's first grade teacher Mrs. Reba. At that time she told us that Michael was doing poorly in reading and that if he didn't improve significantly we might have to think about detaining him. At that point we talked further with Mrs. Reba and we told her our feelings that Michael might have a learning problem. We told her what we had noticed earlier with regard to colors, not being able to remember them, not being able to remember numbers or the alphabet and we asked her if there was testing available we were very concerned about Michael, was there testing available so that we could determine if Michael had a reading disability. Mrs. Reba told us that Michael was [11] immature that was the only cause of his problem. We asked her again if there was testing available for Michael and she said there was none that she knew of but she would look into it.

Q. Now inviting your attention to March of 1977 did you have another conversation with Mrs. Reba?

A. Yes we did. Again.

Q. Did you at that time inquire about tests availability to determine if there was a reading disability?

A. Yes in March 77 we initiated a conference with Mrs. Reba and at that time she told us that her recommendation was going to be that Michael be retained. She told us he was doing very poorly in reading and that as the reading became harder Michael did worse. We expressed our concern again as to Michael's problem and she told us it was strictly immaturity, Michael was a late month child and it was very common among late month children to have trouble in school. We asked if he could be tested even at our expense did she know of any testing that we could have for Michael to determine if he had a learning disability. She told us there was none for a child of his age. She told us she would look into it and there was none for a child of his age.

Q. Now do you have a relative by the name of Janet Ruggiero?

A. Yes. I do.

[12] Q. And how is Janet Ruggiero related to you?

A. She is a cousin by marriage.

Q. Do you know what her profession is?

A. Presently she is a mother and housewife. At the time in May at this point in time in 1977 she was a first grade teacher in the Chelsea School Systems.

Q. Did you at some time ask her to do some reading tests with Michael or examine his reading skills?

A. Yes in May 1977 we talked with her and explained Michael's situation, potential for retention, etc. and we asked her if she would spend time with Michael, examine him as a teacher and give us her opinion as to (1) whether or not Michael should repeat, how she saw Michael, how he was doing etc.

Q. And did you, did she at that time inform you about 766? About Chapter 766?

A. Well we asked her to test him. She did come and test Michael. At the time she tested him she spent about four hours with Michael alone, she covered material that was age equivalent and month equivalent to the first grade for Michael and after the testing we had a long discussion with her about what she had found with Michael during that testing.

Q. And what did she disclose that she had found?

A. She said it was her opinion that Michael displayed several of the characteristics that she had seen in the past of her experience relating to either a learning [13] disability or a problem with Michael's eyes possibly. She said she found Michael to be extremely eager, intelligent, but had an inordinate amount of problems with reading and with language type work. She suggested that we have Michael tested, his eyes tested, and that we have Michael tested for a learning disability. We told her what happened in Burlington, the teacher said there was no such testing, and she informed us about Chapter 766 and suggested that we request a full core for Michael.

Q. Now did you have his eyes tested?

A. Yes we did on two separate occasions.

Q. And did you have any problem, did the test reveal any problems in his eyes?

A. Michael's eyesight was to the best of my recollection better than 20/20 in each eye.

Q. Now did you obtain recently on September 17 a * * *[1] statement from Janet Ruggiero?

A. Yes I did.

Q. And that is your document P-1?

A. That is correct.

[1 Asterisks appearing passim in this transcript indicate portions of questions and answers that were apparently unintelligible and therefore not reproduced by the stenographer.]

Q. All right. On May 31st, on or about May 31st did you receive a letter from the Burlington School System referring to an education plan?

A. Yes we did.

Q. And that's your document P-2?

A. That is correct.

[14] Q. Now, prior to this plan were you given a notification from the Burlington Schools as a right to have a full core?

A. We, prior to the plan we knew nothing, there was no core, we were never told about a core, we were never told about testing.

Q. Does that plan make any provision for your refusing the plan that they suggested?

A. Yes it did. No well, it gave me a chance to accept it only it didn't have anything about refusing it.

Q. It suggested you could comment on it.

A. That is correct.

Q. Do you know of any assessments that were made in preparation of that plan?

A. There were none.

Q. There was no meeting prior to this plan being presented to you?

A. There was no meeting whatever.

Q. Allright. Does that plan recommend or inform you that there will be counselling provided for Michael?

A. Yes. The educational plan called for counselling for Michael.

HEARING OFFICER: Excuse me. May I ask you to clarify which document —

MR. GALLAGHER: That's P-2. Essentially this P-2 which is actually two pages here, an undated covering letter and an enclosed letter dated May 31st [15] essentially states that they wish to retain Michael in the first grade. Yes. Essentially P-2 which is a two page document, an undated covering

letter complete with an enclosure dated May 31st suggests that Michael was to be retained in the first grade.

THE WITNESS: That is correct.

Q. Does this education plan dated May 31, 1977 have any provision in there for academic work or plans for the following year?

A. It showed nothing, the educational plan called for nothing more than accepting that he be retained. There was nothing in there about his educational plan whatever.

Q. And it just provided for counsel in small in groups?

A. That is correct.

Q. On June 3, 1977 did you have a conference —

MR. GALLAGHER: We offered this before by mailing it in, I'm just inviting the Hearing Officer's attention to it.

MR. BERMAN: I want to make sure I understand the procedure. I understood that only those writings that were specifically made Exhibits would be considered. Does the Hearing Officer consider the previous admissions of both the School Committee and the parents to be already exhibits or does the Hearing Officer consider that they now have to be separately offered.

[16] HEARING OFFICER: No. Not separately offered. I've already within the record indicated that these have been submitted as exhibits and —

MR. BERMAN: They are, they are * * * the tapes right now.

HEARING OFFICER: There has not been any objection to their admission, if you want to —

MR. BERMAN: No, no I do not.

HEARING OFFICER: — question whether they should be submitted or not —

MR. BERMAN: No, I do not, I have no objection to any of that * * *. What I am going to suggest is this, if these are already in evidence, it's fine with me if they are, I just want to

know this, but I — If these are already in evidence I think some time can be saved by not asking questions concerning matters the Hearing Officer can plainly see for herself as to what a page that is already an exhibit says or doesn't say. That seems to me to be a matter of argument rather than for evidence.

HEARING OFFICER: I would, there are a couple of points (1) in the interest of informality in this kind of hearing if you would prefer that Mr. Panico testify as to his own * * * conception of what occurred during that time period directly without changing the format of the latitude that [17] * * * you don't need to do it if you don't want to.

MR. GALLAGHER: I don't have to do it.

HEARING OFFICER: You don't have to do it if you don't want to. Mr. Panico can essentially testify in paragraph form * * *. And either way you do it however if you feel comfortable doing it in a formal way then fine I'll accept that. And you might be able to pinpoint those areas that you would like to emphasize or if there are specific questions you think that have been omitted for some reason or other * * * I'll allow that. I would agree that there really isn't any need to testify as to the contents of the documents because as I've said I've already read most of them and will reread them as well so if there are things that you want to emphasize that are in the documents then that's fine and that would be helpful to me. As far as the relevance of the testimony that's just been given I assume that the point you are trying to make is that from Mr. Panico's conception might not have been adequately informed of the existence of procedures under Chapter 766 in the early part of Michael's school experience.

MR. GALLAGHER: That's correct.

HEARING OFFICER: O.K. I would accept that as being you know, relevant to the discussion and would allow it.

[18] Q. Now on your document P-3 are these notes of a conversation you had with Mr. Barrows on June 3, 1977?

A. Yes they are.

Q. Is it customary, do you frequently make notes of conversations which you consider important?

A. Yes I do.

Q. And when were these notes made?

A. They were made about 15 minutes after I met with Mr. Barrows. I went home and made the memorandum of contact.

Q. All right. Now regarding this conversation with Mr. Barrows would you, and spell out, what took place at that occasion.

A. Yes, I went to see Mr. Barrows relative to the proposed educational plan that I had received for Michael. I went to see Mr. Barrows at his office in the Memorial School relative to the proposed Ed. plan we received for Michael Panico which called for retention and which called for counselling. We discussed Mike in great length. Mr. Barrows stated that Mike should repeat. Mike was very immature and he's found through his experience that children born late in the year all on most occasions have problems in school and actually the whole school system is wrong they shouldn't start a child at that age, etc, etc., Mike should be repeated and that would be the best thing for him. I expressed to Mr. Barrows that Michael wasn't strictly a [19] chronological age problem but more a learning problem. I told him of my having Mike examined by two teachers and they felt that he had a learning problem and I told him I would like a full core. Mr. Barrows stated that Mike had no learning disability and that his only problem was immaturity and he told me to take his advice and repeat Mike. Again I asked Mr. Barrows for a full core and he told me no way. Those were his exact words. I then told him I was demanding a full core for my son and he told me that if I wanted a core and demanded it he would wash his hands of my son. He then told me if I wanted the core I would have to do it myself and I told him I didn't know how and he said "Here" and he gave me a piece of paper which is attached to my memorandum,

from the desk of Dick Barrows, and he put a name on it Jean Aarons [*sic*] and a telephone number and he told me she was the person to get in touch with if I wanted a core and he reiterated once I went to Jean Aarons "don't come back to me about Michael."

Q. Now that is your document P-4 of this notation from Mr. Barrow [*sic*]? —

A. P-3 is the document from Mr. Barrow and attachment to it. The third page of P-3 is the note from Mr. Barrow plus a note that I wrote on the same day saying that I received it.

Q. So the top part of that paper is in Mr. Barrow's hand writing?

A. That is correct he wrote it in front of me.

[20] Q. On June 3rd did you also write a letter to the Superintendent of Schools requesting a core?

A. Yes I did.

Q. And that's document P-4?

A. That is correct.

Q. Now on June 3rd did you also receive certain documents from Jean Aarons regarding or your wife receive certain documents regarding the core?

A. On June 3rd after talking to Mr. Barrow I prepared a letter and I called the Superintendent and I called Jean Aaron, the number I received from Mr. Barrow. Jean Aaron told us yes, no problem. In fact we told her that thing, we'd like it done before the end of the year and she was very cooperative and to the point where she even asked if we could come up that day, she'd have the papers, we could sign them and start the thing right away so we could have it done before the end of the year. And my wife went up to the school, to the office of Jean Aaron and met with her and signed the appropriate papers and then we received a package which was our copies and the necessary, and we thought was the necessary information that we were supposed to receive at that time.

Q. And the documents that you received at that time are incorporated here as P-5.

A. Yes, this is everything that we received that day that my wife received from Jean Aaron.

[21] Q. And at the time were you informed of your rights to have an independent evaluation?

A. No we were not.

Q. All right. And did you have any explanation at that time of your due process rights in this matter?

A. There was none. We were just told, my wife was told and I was told because I talked to Jean Aaron on the phone what the full core was, that Michael would be tested and we would find out whats wrong and if there was a problem they would be able to help him and etc., etc. In fact I talked to Jean Aaron subsequent to my wife going up there in the afternoon and she had seen my boy and she told me that from what she had seen that if he did have a problem it was nothing to worry about that he was a healthy happy little boy and all and when I went home this was the package that we had the five page packet that we received from the school.

Q. Now on June 23rd did you have in fact a core meeting?

A. Yes we did.

Q. And would you state who the parties were that were present?

A. O.K. According to my best recollection on June 23, 1977 the parties were Beverly Reba who was Michael's first grade teacher, Elsa Glickman, I believe, who did the home assessment, Becky Silverstein, who was held to be a reading specialist, Myra Fornier [*sic*], held to be a school counsellor, Dick Cavanaugh who was the school [22] psychologist, Jean Aaron, the core Administrator and myself and my wife.

Q. And did you present the document P-7 which is the medical examination by a Dr. Melvin Levine?

A. That was presented, I believe it was presented to Jean Aaron prior to that date. It was given to her a few days in advance.

MR. GALLAGHER: I would just like to call the Hearing Examiner's attention to page 2 of that document in which the doctor expressed the opinion that there was dyslexia and recommended advancement to the next grade with learning disability teaching regarding dyslectic problems. And the other documents regarding this first core are on P-8. A letter P-6. P-7 Levin's report, we just mentioned that. A document by Mr. Cavanaugh P-9 and in regard to Cavanaugh's document P-9 I would like to invite the Examiner's attention to paragraph 6.1 in which Mr. Cavanaugh points out that Mike was not emotionally disturbed and emotional injuries in and of themselves should not significantly affect his academic performance. And document P-10 which is a home assessment.

Q. Now I would like you to summarize what the conclusion of this meeting was as you understood it.

A. The meeting involved discussions of my son by several people as they saw. There was no question in my mind following these discussions that we found that Michael, [23] and I say we because I considered myself at that time part of the group, we found my son Michael to have a learning disability. The specifics were not really defined as to what was his learning disability. I questioned Dr. Levine's statement of dyslexia and was informed by Jean Aaron that dyslexia covers a myriad of things and it more or less covers learning disabilities. To say that Michael has dyslexia and then try to pinpoint what to do to help him isn't really too fair. It was kind of decided or talked about that Michael might have had a hearing problem growing up because of ear infections and maybe Michael learned to function without listening. Myra Fornier made a recommendation that Mike probably had to be taught visually, etc. and in conclusion it was decided that Michael would be taught in a special way and would get special help in his reading which would be appropriate for him. He would be taught a little bit differently then everyone else and he would be

taught by someone in a method other than in his own classroom. He would be taught to read differently than other children would be taught to read as a result of what was found. The specifics of how it would be done were not discussed but I left there feeling very content that Michael was going to be helped.

Q. Did you receive a written decision from the core meeting?

[24] A. As to the results of the core meeting nothing.

Q. Did you receive an education plan?

A. Never.

Q. During the summer did you have Michael tutored privately?

A. Yes I did.

Q. And was that by Janet Ruggiero?

A. Yes it was.

Q. And regarding holding Michael back to the first grade did you defer your decision on that till the Fall?

A. Yes we did because we wanted to wait for the results from Janet Ruggiero as to her tutoring with Michael and what kind of progress Michael made.

Q. Now on September 6, 1977 did you make a phone call to Jean Aarons?

A. No I didn't but my wife did.

Q. And you have document P-12 in here?

A. Yes I do.

Q. O.K. And at that time it was expressed that you wanted the boy to go on to the second grade?

A. That is correct.

Q. And do you understand the notation at the bottom of the page that says call to Dick Barrows no special services in grade two.

A. All I can say is I have no idea of what or who made the notation or what it meant. I was certainly led to believe and

the reason we called Jean Aaron. Jean Aaron at the time had told us that Michael would be [25] getting help, she was going to handle it. The only thing we were asked by them to do was the plan would be dependent on what grade he was in. He would get the same special help and the only difference might be the placement and we were asked when we were ready to send him back to school after this tutoring to get in touch with her so she could make the appropriate arrangements to have him get the special help depending on which grade he went in and inform his teacher of his special help and his special need. That's why Jean Aaron was called.

Q. Then on September 7 is the letter over signature of your wife effectively asking that the boy go on to the second grade.

A. Yes that is correct.

Q. In fact were any special services provided for your boy in grade two?

A. Originally no, and subsequently to a reconvening of the core in March of the following year they were but at the beginning of grade two nothing was provided for my son.

Q. Were you informed that no special services were to be provided in grade two?

A. We were never informed of this prior to grade two or at the time he commenced second grade we were never informed of this, no.

Q. Did you make a phone call to Mr. Barrow sometime in September of 1977?

[26] A. Yes. Prior to the start of school I called Mr. Barrow at his home just to let him know that Michael was going to the second grade and also to get his assurances because he was the principal of the school that Michael would be getting the special help that we had talked about the previous year at the core meeting. And Mr. Barrows told me that Mike would be getting that special help.

Q. Do you have any notes of that conversation?

A. No I don't have any notes of that.

Q. All right. Now in October of 1977 did you visit with his reading teacher, Mrs. Hannon?

A. Yes we did.

Q. I wish you would summarize the conversation you had with Mrs. Hannon.

A. O.K. We met with Mrs. Hannon in October. It was an open house parent/teachers type thing in the evening. When we went in to Mrs. Hannon we introduced ourselves. I introduced my wife and I and the very first words out of her mouth were to the effect don't you feel you've made a mistake in not repeating Michael.

Q. Now did you inquire about the learning disability?

A. Yes we then discussed what she meant. We told her about the previous core, we told her Michael had a learning disability and we asked what was being done, what about it. She said she did not know anything about it. She was not aware of a learning disability, she was not aware that there was a core, or anything else. I asked her if she had read Mike's file. She [27] said no, she doesn't read kids files she liked to make up her own opinion of the child. She likes to form her own opinion she doesn't like to make predetermined judgments about a child. So I asked her if she would please look at his file he was supposed to be getting special help. And she said she would and if there was a core and he should be getting help she would insure that he got the help.

Q. In November did you again have a parent/teacher conference with Mrs. Hannon?

A. Yes we did. In November at a regular parent/teacher conference we again spoke to Mrs. Hannon. At this time she told us that Michael was her poorest student, he was unable to do the work, he needed constant help and she suggested that we put Michael back in the first grade at that time. We told Mrs. Hannon again about Michael's learning disability and asked her if she had looked at his folder and what was

being done. She told us that she would look at the folder and she said she hadn't but she said she had talked to Mr. Barrows about Michael and she said that Mr. Barrows had told you last year that Michael should have been repeated. He told me he told you people that last year because he was immature and he should have been repeated and no he wasn't getting any special help.

Q. Now would you please explain how Michael was reacting [28] during October and November of 1977?

A. Sometime in late Fall 1977 Michael started to develop severe, severe headaches, vomiting, constant pounding that he wouldn't go out and play, he would throw up in the afternoon, at night, in complete agony. Also he started developing, right terminology I think is night trauma, he was waking with nightmares, screaming. His eyes would open but we couldn't get through to him. He would be screaming and shaking. He would be telling us that the teacher was calling him stupid. That the people were out to get him. That the teacher was out to get him, she was gonna get me, she was gonna put me back in kindergarten. This would go on for fifteen to twenty minutes with no way of waking him up, crying and shaking. It started within a two week period of getting brutal. We now no longer thought of them as being an ordinary nightmare. The boy was distraught, the headaches were severe, it was pathetic. That's the only way I can state it.

Q. Now with that in mind did Dr. Levine recommend that you take him to see a Dr. Lott at the Massachusetts General Hospital?

A. Well because of the headaches and mainly because of the nightmare and the screaming we got very concerned and we took him to Dr. Levine his pediatrician for an examination first. Dr. Levine examined Michael in great length, he put it at the end of the day [29] because he wanted a lot of time with Michael and we spent several hours with Dr. Levine who

who examined Michael neurologically as best he could physically, talked to Michael, tested Michael and sat with us. At the conclusion of this examination Dr. Levine told us that it was his opinion that Michael had pediatric migraine in that he had a severe learning disability. From what he could determine through his testing he had a severe learning disability and he told us that he would like to refer us to Dr. Ira Lott [*sic*] at the MGH Pediatric Neurology Unit to be certain that there was nothing neurologically wrong with Michael that there was no maybe tumors involved or nothing on his brain or nothing that could be causing his nightmares or the sudden change in Michael or anything else and also for treatment of the pediatric migraine if in fact that's what it was, and also that Dr. Lot if everything was ok other than if the physical were nothing more, for instance there were no other neurological disfunctions, then Dr. Lot could also test him for a learning disability.

Q. And did you take him in to see Dr. Lot?

A. Yes we did. We made an appointment with Dr. Lot and we took him in to see him.

Q. And what was — about when was it you took him to see Dr. Lot?

A. It was December, 1977. I think it might have been [30] December 19 but I'd have to look at the documents. But it was December 1977 that we took him to Dr. Lot.

Q. And what did Dr. Lot tell you at that time?

A. At that time after a complete neurological and I have to bring that up because Michael went through brain waves and everything, Dr. Lot told us that Michael had severe pediatric migraine. He also told us during his neurological that Michael had a severe learning disability which had to be treated.

Q. And did you tell Jean Aaron regarding that?

Q. Yes, subsequent to the conversation with Dr. Lot I did call her to tell her that we had had him there to Dr. Lot, that

Dr. Lot found a severe learning disability and that he was going to be tested at the Mass. General for it. By the way Dr. Lot had referred, told us that he wanted Michael tested at the Clinical Function Testing Lab at the Massachusetts General Hospital to determine whether or not or what his disability was.

Q. All right. And there is a note on page 35 of the School's documents corroborating this telephone call from you to Jean Aaron?

A. In December?

Q. Yes. In December 1977.

A. Yes there is.

Q. Now in January or February did you have additional tests done at the Massachusetts General Hospital?

A. In January, early January Michael was tested at the [31] Clinical Function Testing Unit at the Massachusetts General Hospital for a learning disability.

Q. And the results of these are incorporated at 15 and 16 in your parents documents?

A. Well document 15 the letter from Dr. Lot to Dr. Melvin Levine Michael's pediatrician more or less summarizes what took place during the testing yes, and his findings relative to Michael. Document P-16 is the results from the Massachusetts General, the clinical laboratory testing results.

Q. Now there is a difference in dates in these, there is quite a difference in dates, is that the time of the blizzard?

A. You mean between the time of the testing and the time of the results?

Q. That's correct.

A. Yes sir. In fact when we called about the results we were told that the delay was because of the blizzard and the people fell behind and couldn't get to his report.

Q. Now did you pay for these tests at the MGH?

A. Yes I did.

Q. On March 2nd did you have another meeting with Mrs. Hannon?

A. Yes. On March 2 as a result of general conversation I had with Dr. Lot when I had asked about the, I had called him on the phone and asked him where the results were, when we would get them, etc. and he told me [32] preliminary results were severe learning disability etc. My wife and I then went to meet Mrs. Hannon on March 2nd for the purpose of asking her to ease up on Michael that he had a now diagnosed severe learning disability. We told her about the nightmares, we told her about his fear, we told her that my son stated that she was calling him stupid and had on several occasions she threatened to put him back to kindergarten and we explained to her that we certainly, and I think my words to her were I certainly find it hard to believe that you ever said that to Michael but it, you know, anything was within the realm of possibility, my feeling is that Michael just perceives this and because he perceives this whether it happened or not its a problem and could you please just try to give him some reassurance and try to build him up so that school wouldn't become such a chore and he wouldn't be so scared and maybe help his headaches. Her remarks were that his headaches were an excuse, she never called him stupid etc. and then she just refused to talk to us and left and came back with the principal Mr. Barrows. Now when Mr. Barrows came into the room about five minutes later with Mrs. Hannon very sarcastically he asked us if we would like, what do you want do you want Michael taken out of her room and put somewhere else, where do you want him placed? We told him [33] thats not the reason we were there. The last thing we wanted was Mike to be removed from her classroom at this time, we didn't want any more pressure on him this would single him out even more. What we wanted was just if they would be understanding and ease up on Michael. And the answer was that they couldn't that Dick Barrows told us that he had nothing in writing and until he did he would do nothing for Michael. He also told us that if the

doctors found a learning disability at Massachusetts General Hospital they are wrong. His exact words were "What do they know". He said that they have a child for one day and they make all kinds of decisions, we're experts we have them here all year but the doctors know more than us. * * * you * * * doesn't know what he's doing. Which kind of shocked us. We realized we were getting no where and that was pretty much the end of the meeting at that point.

Q. Well did you tell him about the doctor's results that there was dyslexia and learning disability as diagnosed at the Massachusetts General Hospital?

A. We did and he remarked that he had nothing in writing and if the doctors diagnosed that they didn't know what they were doing.

Q. Did he make any comments about the core that had taken place the previous year?

A. Oh yes, I had asked him, you know I asked him why he [34] wasn't getting the help from the core and Mr. Barrows told us he wasn't aware there ever was a core.

Q. And was Mr. Barrows at the core?

A. He sure was.

Q. On March 3d, 1978 did you make a phone call to Jean Aarons regarding the meeting that you had on the 2nd with Mr. Barrows and Mrs. Hannon?

Q. I believe I did. Yes, I not only believe, I did make a call the day after the thing to Jean Aarons to, maybe because at that time I was so distraught, to ask her and explain to her what happened with my meeting with Hannon and Mr. Barrows. I just couldn't believe it had all happened and the attitude of the teachers that no one seemed to care and no one for some reason we had gone against the system and we didn't repeat him and that was that. I asked her what could be done and again Mrs. Aarons at this point was extremely helpful she told me about reconvening the core which then I asked for her to do

and I told her we would get the results from Dr. Lot and she suggested we reconvene the core subsequent to that I think it was maybe within a couple of weeks.

Q. And this document 13 which you obtained your P-13 which you obtained from School Department records corroborates in some respect this conversation between you and Mrs. Aaron?

MR. BERMAN: Objection. * * *.

[35] HEARING OFFICER: I'm sorry, could you repeat the question as far as * * *. We're just trying to locate them.

Q. The document P-13, marked P-13, which you have obtained from the school Department records, corroborates with some respect the telephone conversation between you and Jean Aaron?

A. * * *.

HEARING OFFICER: * * *.

MR. BERMAN: * * *. Perhaps if you could tell us what P-13 is. I do not have * * * here to corroborate.

HEARING OFFICER: O.K. Why don't you read the response that —

MR. GALLAGHER: What I don't understand is what P-13 is.

A. The document P-13 which I obtained from Mrs. Aaron on the, relative to when we requested records on Michael from the special education program heads up TC from Mr. Panico 3/3/78 which certainly it seems a telephone call from Mr. Panico — Bob, who is me. Severe migraine headaches, medication seems to have helped. MGH learning disability, Dr. Lot. Very—

MR. GALLAGHER: I don't * * * —.

THE WITNESS: O.K.

A. It corroborates in full or at least it states that I made a telephone call to Jean Aaron and internally in the document, the document reiterates many of the statements that I made or

that I had heard from Mr. [36] Barrows and had written down on a sheet of paper.

HEARING OFFICER: O.K. So essentially your point is that you are in agreement with these notes made by Jean Aaron of a telephone conversation that you had with her on that date?

THE WITNESS: Yes.

Q. All right. Now, at about this time were arrangements made to implement the counselling which had been spelled out in May of 1977?

A. Not at this point in time. That didn't come until subsequent to the reconvening of the core which was on I believe March 20th or March 17th. At the meeting at the time of my conversation on March 3rd there was no mention of the counselling at that time.

Q. In drawing your attention to document P-14 —

A. Yes I have it its an undated document.

Q. Do you know what that document is or where did you obtain it?

A. It was obtained from the special education folder of Michael Panico.

Q. Do you know what it reflects?

A. I do since this morning when Jean Aaron detailed what it reflected.

Q. And what is your understanding what that is?

A. Its * * *.

HEARING OFFICER: Is there any disagreement with respect to the School as to what that document is because its labeled * * *.

[37] MR. GALLAGHER: That's not what its labeled.

HEARING OFFICER: * * *. O.k. and then he said —

MRS. AARON (?): She never said such a thing — what happened was in the phone call I was relating to Mr. Barrows that Mr. Panico had shared with me. He wanted to know his impression of what had happened in the building and during that

meeting and I was copying down words and Mr. Barrows said "She never said such a thing" and I wrote in my own notes I got nowhere in terms of trying to resolve what the issue was. And Mr. Barrows then informed me that he would tell the teacher and the teacher said she would try to build the child up according to Mr. Panico's wishes.

HEARING OFFICER: O.k. So essentially this is a discussion with Mr. Barrows subsequent to the phone conversation?

MRS. AARON: Yes.

HEARING OFFICER: O.k. * * *.

THE WITNESS: The notes of my conversation on that same date with Mrs. Aaron are spelled out by her in which she * * * in P-13 which she said were the notes I made on that call and on the next one which is P-14 in which she says was her telephone call with Dick Barrows resulting from my call. The second page of that document ah once you go to Jean Aaron its out of my hands scares me. Is this her conversation with Dick Barrows or Dick Barrows stated that once I go to her its out of his hands and it [38] scares me mean Jean Aarons is scared of a remark like that from Mr. Barrows or if it's mine why isn't it in that telephone conversation with me?

HEARING OFFICER: The point is that you're —

THE WITNESS: I mean I can't state exactly, that is I can't say that this is —

MR. GALLAGHER: We're not saying that, any of that.

Q. Now on March 7, 1978 did you go and see Dr. Lot again regarding Mike?

A. Yes, on March 7th my wife and I went to meet with Dr. Lot for his evaluation of Michael to explain test results and pick up a copy of the test results and you know interpret it and find out his opinion of what we should do.

Q. O.k. And then there is a letter of March 10 from Dr. Lot to Dr. Levine which is our document P-15. Then there is the document P-16 which is the clinical function test result

at MGH. Now on March 17, 1978 was there in fact a core meeting?

A. Yes, as the result of us picking up the documents and asking Jean Aaron to reconvene the core a meeting was set up for March 17, 1978.

Q. Now, regarding, well tell us about the core meeting of March 17, 1978.

A. March 17, 1978 we went to this meeting, my wife and I. [39] Janet Hannon Michael's teacher was there and Myra Fornier, Jean Aaron. Dick Barrows came in, he was not there for the entire period of time but he was there for a good portion of it. If there were anyone else there I don't recall them off hand. At this time the only real subject, the only thing discussed was the MGH results. What the MGH found and it was pretty much agreed Michael had a learning disability which should be addressed. We were told that he would be getting special help, we were told that he would receive one on one tutorial, we were told that he would get counselling by Myra Fornier, only to the extent that counselling would just you know try to get Michael to talk about the fact he had a learning disability, try to get him to you know, remark that he isn't different because he has a learning disability there's nothing wrong with him because he has a learning disability, he just learns differently and this counselling would be done to build up Michael to that degree. Everything was very amiable and when we came out of there the way it was explained to us we were very happy with what was going to be done for Michael. I felt good, I felt my boy now has a chance and seemed as though everything was going to be done the way it should be, at least the way I thought at that time it should be.

Q. Now was there a medical exam done for this core?

[40] Q. 1978?

A. No there wasn't.

Q. Was there a home evaluation done?

A. No there wasn't.

Q. Were you given an education plan as a result of that core in 1978?

A. Subsequent, a few days later, I figure a week or ten days, I'm not sure. We received an education plan covering the period 3/23/78 thru 3/23/79, spelling out what Michael would receive as far as special help. The plan called for one hour a day with Catherine Black alone. By this time we had met Catherine Black and we were very satisfied with the hour a day and it called for the counselling of Michael by Myra Fornier, groupwise and individually, in that specified period of time which was —

Q. And you accepted that education plan.

A. Yes; that was after, you know, * * * Dr. Lot we accepted he plan.

Q. And that is signed on the last, that is document P-16 and it is signed on the last page by Jean Aarons and it is also signed "I certify the above objectives are those recommended by the core evaluation Team and the above-indicated services will be provided in that sum by Richard C. Barrows on April 4, 1978."

A. Right, correct. That's P-17 for the record, not P-16.

MR. GALLAGHER: P-17?

HEARING OFFICER: Yes.

MR. GALLAGHER: You're right.

[41] A. That is correct. It's signed by Jean Aaron, by Richard Barrows as principal and by myself and my wife as parents.

Q. O.k. And was that plan implemented forthwith?

A. Yes it was.

Q. And what did you observe about your son Michael from that point on?

A. Subsequent to the initiation of the plan and I have to bring it up through lets say June when we had our first quarterly core meeting, Michael almost turned around as far as the — his

problems. His headaches diminished at great length, he was more relaxed, he enjoyed working with Catherine Black immensely. He actually attempted to read at home which he had never done before, he was reading small words. He was not the child he had been before, he was more relaxed. He felt pretty good about himself and started to seem to be acting and making pretty good progress in school. School wasn't a chore, there was no night awakening, there was no nightmares, there was no remarks that people were calling him stupid, the teachers calling him stupid or anything else. It just seemed to help Michael terrificly.

Q. Now did Catherine Black continue to tutor Michael through the summer of 1978?

A. During the summer of '78 Catherine Black prior to the end of school, Catherine Black asked us if we would object to having her work with Michael over the [42] summer. There would be no charge to us. She would come and do it on her own. She could get a classroom at the Pine Glen School and we would have to bring him up there I think it was two or three days a week for about an hour or thereabouts. She liked to work with Michael and since he had made such good progress she didn't want to lose any over the summer and she thought it might really help with the method of teaching * * * and she didn't want him to lose anything so she asked if she could tutor him and you know, we said sure. And she did work with him over the summer and we made all * * * about the schedule.

Q. Do you know if she was paid by anyone for her services during the summer?

A. Not to my knowledge she wasn't.

Q. And we have P-18 before you. Now we have a report of Myra Fornier on 6/1/78 concerning — we wish to invite the Hearing Officer's attention to on that P-19.

A. The only thing I can state was P-19 is * * *. The one thing I would * * *.

Q. Then there was a letter of June 7, 1978. Was that report of June 1, 1978 mailed to you?

A. No it was not.

Q. How did you receive that?

A. It was delivered by my son in an envelope to the Parents of Michael R. Panico.

Q. Now on June 7th —

[43] HEARING OFFICER: * * *.

THE WITNESS: Yes. I say to the Parents of and I would like to go on to explain this if I may. This document P-19 was received by us and it was to the parents of and it was brought home by my son. The one previous P-18 from Catherine Black was never received by my wife or I. I have something that I have to bring up to the vulnerability of such a method of bringing these things home. All I can see is my son with a learning problem, forgetful, with a very poor memory problem and whether or not the document P-18 * * * the report was sent I don't know. If it was sent home with my son it could very well have been lost. Also P —

HEARING OFFICER: * * *.

THE WITNESS: No, I'm very concerned about sending home with a child something that is potentially damaging as a psychological report if it gets lost be read by anybody in the neighborhood or a child or anybody else. It could also be read by Michael Panico, he could read or have somebody read it to him. Things that could be extremely damaging to my son and my family if they were. This isn't the things you want to publish in the newspaper or let everybody know.

MR. BERMAN: * * *.

[44] THE WITNESS: I would make P-18 and P-19 to be very damaging to my son and my family. It would have upset my son immensely if anybody mentioned it to him.

MR. GALLAGHER: All right, fine.

Q. Now on August 16, 1978 did you have a conference with Kevin Foley?

A. —

Q. All right, lets go back now. Well we know there's a letter in your records here, #P-20 to Dr. Lot from Jean Aaron, dated June 7, 1978.

A. This letter is nothing more than Jean Aaron stating pretty much what I said earlier to Dr. Lot that Michael was making great progress, good progress in reading and appeared to be much more * * * in this academic area. This is after three months of the specialized program with the hour a day with Catherine Black.

Q. And P-21 is a letter from Dr. Lot to Dr. Levine?

MR. BERMAN: Please, I thought we went through this once. The letters * * *.

HEARING OFFICER: You want to * * * I don't want to rule it out entirely but for reference there are documents I can read myself. * * *.

A. O.K. Well in very short order, P-18 through P-21 are significant in my feeling as they point out to the great improvement Michael made while under a specific [45] educational plan calling for one on one tutorial with Catherine Black.

Q. Now inviting your attention to August 16 did you have a conference with Kevin Foley regarding your son's educational plan?

A. Yes. On August 16 I met with Mr. Foley and the purpose was as follows. I went to Mr. Foley to explain what I felt were all the goofs of violations of Chapter 766 that transpired so far up to that point relative to my son Michael. The fact that we were told there was no testing, the fact that I had to fight for a core, the fact that no educational plan was developed, the fact that I received no notice that there was no need for special needs, the fact that we did not receive notice of our rights of appeal, etc. and I also told him that I felt that maybe the teachers weren't aware of learning disabilities and I offered to buy a book I was reading at the time and donating it to the

school which was agreeable * * *. And I also then — the primary purpose of my being there was my expressed concern over Michael's edu ation, wouldn't Michael get that educational plan if it was called for, would there be any changes. He had made great progress in the first quarter, would it be continued or was there gonna [*sic*] be changes. Mr. Foley guaranteed me that Mike's educational plan would not be changed without our knowledge or against the law, Mike would get all the services he was entitled to.

[46] Q. Now did Mr. Foley give you a letter or send a letter to you which is your P-22 dated August 17, 1978 spelling out the conclusion of that meeting.

A. Yes he did.

Q. And did he spell out that the educational plan would not be changed without your knowledge and your assent?

A. Yes he did without * * *.

Q. Well I would just like your attention to the fact that he said that it wouldn't be done without the core and that there would be a meeting with the school teacher in September to bring the teacher, the classroom teacher aware and the other teachers aware that Michael has a special learning program.

A. That is correct.

Q. In September '78 Michael began the third grade?

A. That is correct.

Q. What was, what happened in September or October of 1978?

A. In September of 1978 when Michael began the third grade the educational plan was still in effect. Very early, maybe a week or so into the school year, Mike began becoming frustrated again and complained about school, too much work. He had told us that he had to work with Mrs. Black and he had to go back to his reading teacher and she gave him all the work he had missed while he was with Mrs. Black and he had to make that up and he had missed recess and missed lunches

and etc., etc. Very early on, I think [47] it was September 29, in fact it was September 29 of 1978, we had a core meeting and at that point in time the problem was brought to the attention of the core team about Michael being frustrated about having to do other work. It was determined that Mike's classroom teacher wasn't aware he couldn't do the regular third grade work and he didn't have to make up the work he missed while he was with the learning disabilities teacher, etc. and she was called into the room, into the meeting and it was worked out and she was apologetic for it happening and she would explain to Michael stating he shouldn't feel frustrated it wasn't fair to him it was just a misunderstanding. She was very nice and very helpful but it had caused him problems. But it was corrected on 9/29/78. At this time the meeting was just in general as to what Michael would expect at the end of the Ed plan and he would be getting the help with Catherine Black.

Q. And was it indicated to you at that time that in fact he was progressing well?

A. Well at that time it was very early in the school year but the reports were that, what had happened the previous year and Michael was making pretty good progress. He wasn't a reader by any stretch of the imagination but he was making progress in his reading skills.

Q. Now subsequently by other sources had you determined [48] that in fact about this time or before this time of this meeting of September 29, 1978 that in fact his reading program, special education program had been effectively cut in half? That is to say he was not getting an hour a day?

A. Yes, in May, 1979 we were told that Michael's educational plan was cut from an hour with Catherine Black to 30 minutes. We were told that the school knew about it and to cover themselves they had Michael sit in the learning center alone and Catherine Black was to give him work to do and then subsequent to this she had told us that he couldn't do the

work on his own. She brought it to the attention of the school department. So we found out in May that Michael's Ed plan had been changed and we were never informed. We went through a whole year being told he was getting the help and being told that he was improving.

Q. Now did you have another core meeting in November of 1978?

A. Yes we did. We had one a scheduled meeting which, when I say a scheduled meeting we were told about it when the meeting was called, it was on 11/16/78. To the best of my knowledge Sally Hennessey, Myra Fornier, Catherine Black, Jean Aaron, Dick Barrows, my wife and I were present.

Q. And effectively what took place at the core meeting?

A. Pretty much we were told that Michael was showing improvement, his reading was improving, he was [49] progressing. Pretty positive type statements were made.

Q. All right. Now did you have other core meetings before May of 1979?

A. Yes, we had a core meeting on March 16, 1979.

Q. Now we have a — P-23 is self-explanatory. It's a statement from Catherine Black we don't have to go into that any further. In February of 1979 did you have, did you take Michael into the MGH. Excuse me, in February 1979 was Mike put in the MGH or the Lawrence Memorial Hospital?

A. Yeah, February of 1979 Michael became sick, seriously ill, couldn't move, couldn't life his arms, couldn't go to the bathroom, stand up, couldn't eat, could not do anything for himself, so we took him to his pediatrician who immediately rushed him to the MGH where they had a team of doctors waiting for Michael and they worked on him for about 10 hours and tried to determine what was wrong with him. At that point in time they had no idea whatever. They admitted him to the Lawrence Memorial Hospital under the direction of his pediatrician with a bed not available at the MGH. Because

of the uniqueness of the situation he was becoming somewhat of a * * * . No one knew what was wrong with him. Anyway he was admitted at that point in time through approximately a week at the Lawrence Memorial, between the Lawrence Memorial [50] and the Massachusetts General maybe twenty different doctors and no one ever diagnosed what was wrong with Michael Panico other than the one thing was that he started to suffer from abdominal migrane [*sic*] brought on at the time pretty much by what they told us possibly could have been just being up tight and that was as far as minimal the best — they could never make any other determination as to what was wrong with Michael though they guessed it could have been an unknown virus or a virus they had never seen before or things of this nature.

Q. From June of 1978 until March of 1979 what report did you actually receive from the school?

A. In June of 1978 we received a quarterly report from Myra Fornier dated June 1, 1978. We received a quarterly report from Myra Fornier, when I say quarterly I think that was the title, a quarterly report from Myra Fornier dated November 13, 1978 and from Catherine Black dated 11/15/78 and we received sometime in mid-June a quarterly report of Myra Fornier dated 6/5/79. These plus his regular report cards.

Q. Did any of these reports or report cards reflect on his behavioral problem from the school?

A. No nothing reflected in any of the report cards or anything we received up until June reflected anything about any emotional problems, he couldn't cope with people, anything actually related to emotion was never [51] mentioned to us and it wasn't in any report.

Q. All right. Now I invite your attention to May of 1979. Did you and your wife become concerned about Michael?

A. Yeah. In May of 79, it probably started April or maybe even a little earlier, I don't know, Michael started regressing, his reading when he would read with us and he tried to read a word seemed a little worse than it had been. I think it was back where it was sometime in the first grade. He couldn't read, he wouldn't read, he didn't want to go to school, he used to wake up in the morning and cry about not going to school. He started developing bad headaches again, when I say bad I mean he has migraines but they run bad, he had very very bad headaches again with vomiting. He started waking up now during the night on a regular basis crying, he would come into our bed, something that Mike has never done since he was a baby, he would cry in the night and just mumble and ramble incoherently. We became very, very concerned about him at that point in time.

Q. Now did you ask for a core meeting or did you attend a core meeting on May 18, 1979?

A. On May 18, I don't remember if we asked for it. I believe it was just set up by Jean Aaron. I think it was just one of the normal ones. Yes we attended a core meeting on May 18, 1979.

[52] Q. All right. Now would you please tell the Hearing Officer what took place at that core meeting? Well first, who was present at that core meeting?

A. At the core meeting of May 18, 1979 was Patricia Mead [*sic*], who was I believe a language specialist, Gail Mason an LD specialist, Catherine Black, Michael's LD teacher, Jean Aaron and Myra Fornier, myself and my wife, and I believe Sally Hennessey who was Michael's homeroom teacher.

Q. What took place at that meeting?

A. That meeting several things took place, I'm going to have to put them chronologically to give you the flavor. We talked a little bit about Michael and then we were given some results. Miss Mead I don't know if she spoke first, but told us

how she attended to Michael and the tests she had given out and the results. She was very very concerned about Michael's memory, memory abilities. Mason also tested Michael and also said the same thing, memory seemed to be a significant memory problem. Both teachers said they found Michael extremely relaxed, a very calm child, a very likeable boy, no problem, etc. They also stated that they were concerned about Michael's memory. We were given a report by Myra Fornier about you know how Michael was coming along in the counselling, what the counselling was accomplishing or wasn't accomplishing, just saying that Michael was you know adjusting a [53] little better, etc., etc. and Catherine Black made a remark about Michael's reading, he wasn't quite making the progress he should be making, in fact she was a little disappointed in the progress he was making. At this meeting and I believe it was right during open when we were all there, a remark was made by Miss Mead or Miss Mason that Michael probably needed a whole program devoted to learning disabilities relative to the Carroll or Landmark Schools. Whether or not this was said while we were convened I don't know. I do know that subsequent to the meeting I talked to Miss Mead and Miss Mason alone and together. Now I don't recall who said it, if it was said by one in the presence of the other or if it was just said with me and my wife there, my wife and I were both present when it was said. We were told by whichever it is and I couldn't tell you who is who now even if I saw them, it was the only time I had ever met them in my life and they were both about the same age, they told us that we should think about taking Michael out of the Burlington School System and putting him in a private school which specializes in learning disabilities. She said Burlington hasn't been able to help Michael and they've had him for three years. Several schools were mentioned by this teacher, Landmark and Carroll, both of which I had never heard of before in my life. Then the same

teacher that had told us about [54] the schools told us that Mike's educational plan had been changed. After this you know now we're in a little bit of a state of shock, I talked to Catherine Black outside the classroom, outside the meeting and Catherine reiterated what she said. She told us that Michael wasn't making significant progress, his educational plan had been changed early in the school year, the change reduced Mike's time along [*sic*] with her from one hour a day to thirty minutes per day. She told us she brought it to the attention of Myra Fornier and the principal and she was told that they were covered because they had Michael sitting in the learning center for the other time and for her to give him work. She said the reason this was done was because they brought another student into her and what she did was work with the other student while Michael sat there. She said this wasn't for Michael. She told them this and said if Michael cannot learn its only gonna increase his frustration and hurt * * * and she was told that this was her job and this was what she was gonna do. She told us that she spoke to the administration Kevin Foley on several occasions during the school year about Michael and the need to get Michael somewhere else and that Michael's educational plan wasn't helping him. She then told us that it was her opinion that Michael was now at a point where he needed a total program which was directed solely toward learning disabilities. I [55] mentioned to her Carroll and Landmark Schools because we had just heard the names and the others and she told us they were both excellent schools and they both dealt in that and that we should look into both of them. She said

they both have their pros and cons it all depends on how you feel about the schools. Look into both of them I wouldn't want to advise you on either one. And I immediately called and made an appointment at the Carroll and at the Landmark Schools for the following week so that we could look at them and know what we were talking about. On that same day May 18 during the meeting * * * I requested that they retest Michael. I told them we were all of a sudden getting different results, we were being told different things, one time we were being told it's his memory, another time we were told it's this and that, would they please retest him so that we could find out what was wrong with Michael and try to help him.

Q. Now I invite your attention to your documents P-24 which we have indexed here as notes of * * * from Michael Panico's special educational folder dated May 18, 1979. Where did you obtain those papers? Those three pages?

A. I obtained these from Jean Aaron from Michael's special education folder.

Q. At the meeting, core meeting, did you indicate that you were thinking of repeating Michael?

[56] A. Not, never, not at this stage, no. Never in the third grade.

Q. All right.

HEARING OFFICER: Let me interrupt for a moment, o.k.? There has already been an agreement on reading the last four lines of that document that has been presented by the * * *, so why don't we just delete this from here. Mrs. Aaron do you remember the number of the document that * * *.

MRS. AARON: * * *.

Q. At the core meeting of May 18 was there any talk about counselling at Mystic Valley?

A. None whatever.

Q. Did anyone use the word flakes in and out?

A. No, especially with the * * * math process throughout, and especially at that time we were always told that Michael was doing great equivalent or above in his math, he grasped things very quickly, etc., etc.

Q. And that's consistent throughout his record?

A. Yes.

Q. All right. Did you have any conversation with Jean Aaron regarding this document? The P-24?

A. Yes on August 17th subsequent to the mediation meeting between myself, my wife and my attorney and Jean Aaron and Kevin Foley, we went over this folder and I say we, myself, my wife, and my attorney and Mrs. Aarons to pick out the documents in Michael's folder that we wanted to copy that we didn't have. This document and it was three pages together, as soon as we saw it it stuck out [57] because of the remarks which we deleted which is thinking of repeating, we gave your * * *, etc. and attached to it there was a name on a piece of paper —

MR. GALLAGHER: That's been removed already.

THE WITNESS: Yes, but I've got to tell you of the documents.

A. Mrs. Aarons said that the bottom four lines on this page did not relate to Michael whatever that she probably had this sheet out when she got a telephone call. We turned to the next page and mentioned to her well * * *, where did that come from, math process, not wanting to do what he likes math, that is one of the few things he does want to do. And she said that didn't pertain to Michael either it pertained to the same child as did the counselling in Mystic Valley. I then asked Mrs. Aarons, you know, why is this on there, and she told me these were the notes that were taken at the May 18 core meeting, these three pages, and she probably had them on her desk working on them at the time when the telephone rang. She identified all these three pages as being notes taken at the

core meeting of May 18, 1979. One of the things I asked her was why on the top it said father telephone call if they were the notes of the meeting and she told me that it probably meant that she was gonna make a telephone call to me later about something, that she wanted to call me about something and that's on page 3. [58] She identified these three pages as being one document, they were all together, they were held together as a clip and they were told to me that they were the notes of the May 18 meeting and that is the reason we copied them.

Q. And the last page on the lower right hand side the words "Landmark and Carroll" appear?

A. Yes they do.

Q. Was the tonality of what took place in the following meetings significantly different than the tonality of your conversation in the hallway with Miss Mead, Miss Black and Mrs. Mason?

MR. BERMAN: Objection, the form of the question.

HEARING OFFICER: Can you rephrase it?

MR. GALLAGHER: Well, we'll use an analogy, Aristotle likes that.

HEARING OFFICER: O.k. You were referring to —

MR. GALLAGHER: It was the core meeting which took place on the 18th of June and —

HEARING OFFICER: and did the parents perceive any difference in the —

MR. GALLAGHER: It was different communication from which took place in the following meeting and what took place in the hallway.

HEARING OFFICER: [A] word substitute?

MR. BERMAN: Well what about the word [59] intolerant?

HEARING OFFICER: O.k.

A. At the May 18, 1979 core meeting we were told, we were read a few test results, we were told about Michael that

he wasn't doing too badly, he was progressing, etc. At the meeting everyone was very cohesive. Everybody was saying, you know, nice things and nobody came out and said anything to us other than the fact you know, I mean again like I say I don't recall if it was just at the meeting, but if it was it kind of even went by me when in the open meeting it was said Landmark and Carroll maybe we should look into or maybe a program like that or that program or what, I don't know. What I did perceive different was that when the meeting was over when a teacher, teachers talked to them alone we'd get a completely different perception of what we — we were told things completely different or in a little different way that Michael wasn't making the progress and his educational plan had been changed, that he needed a total program. Yes, I felt that I wasn't being levelled with when we were sitting as a team but I was being told straightforward by these teachers when I was alone with them.

Q. And did this alert you to start reading Chapter 766 in the laws and regulations of * * *?

A. It sure did. That's when I called the Commonwealth of Massachusetts to get a, that day, that afternoon to get a set of the Chapter 766 Regs. or law or what have you mailed to me.

[60] Q. Was the decision made by the team at that meeting as to an Ed Plan for 79-80?

A. Nothing was discussed about a plan. No decision was made, I shouldn't say nothing was discussed. No decision was made as to what or where Michael would be going in * * *.

Q. Do you know if counselling was provided for Michael from September 1978 to June of 1979?

A. September 1978 to June of 1979, I have to say, ah let me place my dates here. Second grade, yes I was certainly informed all the way through that there was counselling provided to Michael by Myra Fornier.

Q. Do you know — now lets see — we have some of our exhibits out of order here. I think 34 to 39 would be perhaps

appropriate at this point, I don't need to go into them in detail just effectively.

HEARING OFFICER: Yes, * * *.

Q. Now on May 25, 1979 did you have a conference with Jean Aaron and Richard Cavanaugh and your wife here at the schools in Burlington?

A. Yes I did.

Q. May 25th?

A. Yes I did.

Q. Would you please tell the Hearing Officer what took place at that time?

A. My wife and I requested to meet with Mrs. Aaron and Mr. Cavanaugh, we met here at this school and were [61] introduced to Dick Cavanaugh whom we had met previously as the school psychologist and we were told that he examined Michael and the reason he wanted us up there to talk to him was that he was very concerned with the test results. We were told that Michael was severely depressed and anxious by Mr. Cavanaugh. We were told in such a way that I wrote on my notes to question suicide, sick, I was concerned. I asked him the questions was he suicidal and he told me not now, no he's — I also asked him if he needs psychiatric help and he said not at the present time but maybe he will need it if things aren't improved. He told us that Michael used distinctiation, I'll never forget it, it's a word I've never heard. I asked him what it was and he told me it's a or something to the effect of — he told me by one of the tests that Michael looked at a picture of a girl in a doorway of a cabin which was very sad and she was in tattered clothes or and a boy was sad and Michael talked all around these sad myths and talked about the building being brown and her wearing a certain colored dress and he explained that as distinctiation, not focusing and not, you know, noting what was there but talking around it because he wouldn't admit that there was ever sadness in the

world and he told us that Michael felt useless, he doesn't look at the whole picture, he only looks at the minor details. He takes a look around the thing not to focus on the sadness. He told us that the family life for Michael [62] o.k. His family was held in very high esteem but he's scared of the outside world and everything around him. He told us that Michael has a super ego which he can't meet and he's scared of feeling and then he told us that the reason Michael can't learn is because he has emotional problems. He can't concentrate on learning. He told us the emotional problems caused all kinds of things and he became depressed and angry and anxious and because of all this he couldn't focus on what he was doing and that's the reason he couldn't learn. I asked again if he needed help and Mr. Cavanaugh at that time told me not now but he will if his emotional problems continue. He stated that conflict bothers him and he feels he can't do anything right. There were other things we discussed more about his emotions and how emotionally distraught he was, how anxious, how depressed, almost to the point that I was or became a nervous wreck thinking of all of a sudden I had a sick, sick little boy. After Mr. Cavanaugh got through, Mrs. Aaron told me that based on this here report of Michael's emotional problems she was going to prepare an Ed Plan calling for Michael to go to the Pine Glen School. She said there's a class there for emotional children which John MacLair [*sic*], I wrote in my notes later, which John McLair teaches. She said he really helps these kids to build up their egos, they rely on them. She told me he was going to Pine Glen next year, he can be helped there. Mr. Cavanaugh then told us Mike's smart in some [63] things but other things he has trouble with. Then he told us about the test and he told us he tested Michael — no I'm sorry we asked him about the test because we told him the test was done on the day before, the 24th of May, and we told him Mike came home very concerned because he had to miss recess,

he was kept behind and tested, he couldn't go to lunch with his class and he was told by the guy that's o.k. you can go down later that's when the kindergarten and first grade was going to lunch and that really bothered him and he told us about this so I asked Mr. Cavanaugh about this and Mr. Cavanaugh told us that it was true. The test situation was such that Michael you know had to miss some of his lunch and some of his recess. etc. In fact he said that maybe Mike's, maybe he scored lower than he should have, he's probably even smarter than it shows on his I.Q. etc. because maybe some of these outside interruptions and these outside things were bothering him at the time he was tested. He also told us, I asked a question of learning disability and we were told he had no learning disability, his emotions, the emotional things were his problem. That he could be helped at the Pine Glen School with John MacLair, John MacLair could help him. Then we were told by Jean Aaron that the, we were also told that his reading problem was a result of the emotions and he couldn't concentrate and therefore he couldn't read. Then Jean Aaron told us that the Memorial School wasn't for Michael. She said that [64] Michael had what they referred to in the Town as the Memorial School Syndrome. That Dick Barrows the principal ruins the kids in that school and he's only interested in achievers. She told us that she wanted to get Michael out of that school a long time ago but she couldn't do it because of the law, having to go to the closest class, but now because of Cavanaugh's finding of emotional problems she could place him in the Pine Glen School. She told us about a girl in John MacLair's class who made great progress to the point where because of him, with his help, she even now leans on him, she needs him for support. She could have left the class but she had to stay there because of the need for his support. She told us the kids love him. Also Cavanaugh reported Mike's emotional problems cause everything. Mr. Cavanaugh stated

in his report, "Mike's emotional problems cause everything. He has no learning disability, the emotional causes it. He won't need help for reading once the emotional problems are gone." And I asked the question what came first of — Mr. Cavanaugh, the chicken or the egg. It seems to me that if I couldn't do something, I couldn't do a job at work, I'd become frustrated and I'd probably start having problems too. How can he state that the emotional is causing the learning, couldn't the learning be causing the emotional and he went on around about this and his conclusion was that in this instance the emotional was so severe that that's causing [64A] him not being able to learn. Mr. Cavanaugh then left and we sat with Jean Aaron quite a while. I asked Jean Aaron if from her opinion on what she knew was Mike dangerous to himself or anyone else and she said she didn't think so. She told us that, again she reiterated that Michael shouldn't have been in the Memorial School, the principal was only interested in achievers, he doesn't believe in learning disabilities, everybody is immature when they are born late, etc. I then told Mrs. Aaron — oh, we were also asked to visit Mr. MacLair's class, to take Michael to Mr. MacLair's class the following week so that Michael could see where he was going to school the following year and so that we could see the class and you know, it would be easier for Michael next year, we could see the class and see what grade * * * he worked with these emotional children. At the end of the meeting I told Mrs. Aaron that I couldn't just out and out accept the psychologist's report which to me was as serious as if they told me that my son had a heart condition. I'd have to get another opinion. I'd want him examined by a competent psychologist, not saying that Mr. Cavanaugh wasn't, an additional competent psychologist to get their opinion to find out what exactly was wrong with Dr. Lot, I mean with Michael. I told her that I would like to bring him back to Dr. Lot, we would the following Monday or

Tuesday and we asked for the [65] psychologist's report to be ready. At this point Mr. Cavanaugh hadn't put his report into writing. He was reading from his notes. I told him we had to have it in writing so that we could bring it to Dr. Lot and to an additional psychologist. I then asked her you know if we could have additional testing done on Michael and from my knowledge now which I didn't know before I told her that I ended up paying for all this myself back in 1977 and 78 because no one had ever told us about it and I said now I'm asking you will it be paid for by the Town the additional assessment or I can't agree with these and she agreed and said that they would be and she told us that she would try to arrange I think it was a Dr. Bowman [*sic*] who was also at the MGH in the neurological unit with Dr. Lot and I told her that would be fine that I would like to talk to Dr. Lot first and if he had the time and he would do it I would rather him coordinate it. But Mrs. Aaron was very agreeable to have Michael retested and we would try and see what we could do for Michael. And that's pretty much how the meeting ended.

Q. Now were your notes of this meeting incorporated in P-25?

A. Yes they are.

Q. When did you make those notes? P-25.

A. All the notes on both pages were made during the conversations except for on the left hand margin there are notes which I made when I went home and I put a [66] question mark, Pine Glen — looking into other school, serious problem — worried about Mike. I just put those on there. I don't know why I made them when I went home. I don't know what I intended to do with it or why but those notes in the margin were not made during the meeting, the other notes were all made during that conversation.

Q. Now, did you —

HEARING OFFICER: Could you clarify that date?

THE WITNESS: This was May 25th with myself, my wife, Mr. Cavanaugh and Mrs. Aaron.

Q. Now on May 29th did you see Dr. Lot?

A. Yes.

Q. And what was the conclusion of that meeting with Dr. Lot?

A. Just give me a minute, I want to make sure I'm on the right track.

(DISCUSSION RE: BREAKING FOR LUNCH)

A. Yes we met on May 29th, 1979 with Dr. Lot and we also gave him a copy of the school psychologist's report. At this point Dr. Lot immediately upon looking at the report said that he thought that the school psychologist misinterpreted the test results and he felt that any child with Michael's intelligence is suffering, not being able to learn and having a learning disability would display some depression, some anxiety which would [67] be only a normal result of not being able to learn. He said it would be more a cause, I mean it would be a cause of the learning disability and would not be, I'm sorry it would be the result of the learning disability and certainly wouldn't be the cause. He also told us or we should say we told him of the Town's decision to place Michael in a class for emotional children and he had told us you know based on what we got now he doesn't belong with any emotional children of any kind, he has to learn in a setting conducive to learning. He told us that he would like to alleviate our fears and just to be certain he would like to have Michael re-tested by a clinical psychologist, someone you know who would be highly respected by him and also to refer Michael and us and all of Michael's records to Peter Schoenfeld [*sic*] who I think he said at the time was in charge of the learning disorders unit at the MGH for her opinion of Michael and pretty much the way it was we were to get the names of the Doctor Isenthal [*sic*] and get his address and set up the appointments.

Q. And P-26 is just a notice of the core meeting to be held on June 4th?

A. Yes.

Q. And who was supposed to make the educational assessments for that meeting on June 4th?

A. The date of the meeting and the notice of intermediate full core evaluation dated May 25th included being present John MacLair and this was dated the same date [68] that we had the meeting with Jean Aaron and Dick Cavanaugh. John MacLair * * * being at the core meeting.

Q. At this point no one had, there had been no assent or no team meeting agreed?

A. What?

Q. At this point there had been no core meeting or team meeting agreeing that or concurring that Michael should go to John MacLair's class?

A. There had been no meeting whatever relative to this point.

Q. All right. And on May 31 a self-explanatory letter to the Panicos from Jean Aaron which is document 27. Document P-28 is a letter from Dr. Lot to Dr. Levine dated May 30, 1979. Is there anything you wish to bring to the attention?

A. The only thing I would would be the second paragraph more or less the last sentence which states "The school has questioned whether the primary disturbance may be emotional." This is how Dr. Lot interpreted the school psychologist's report and how we expressed it to Dr. Lot. At this point in time we were told flatly and on May 25th that the class was for, a class for emotional children, and this is what we had told Dr. Lot that they wanted to put him in a class for emotional children.

Q. And P-29 is a report from Peter Schoenfeld to Dr. Lot dated June 27, 1979?

[69] A. That's correct.

Q. And Peter Schoenfeld is the Master of Education at MGH?

A. That's correct.

Q. Is there anything in that letter that you wish to bring to the court's attention?

A. Several items. One in particular would be paragraph 4. or paragraph 3, I'm sorry. "Mr. Panico understood from Dr. Isenthal although Mike's emotional adjustment is of concern, none of the problems exhibited are secondary to his learning disability." Paragraph 4 "In a recent telephone conversation I had with Mrs. Black, Mrs. Black was Mike's LD teacher for a period of approximately a year and a half, this was again reinforced. She indicated that Mike's learning needs were such that the expertise of special educators, burst [*sic*] in the field in the problems of dyslexics, were indicated for his full school day. She further clarified a concern for the type of public school class recommended for Michael may be detrimental to his educational and social adjustment in the children placed in this class have primary emotional disorders. I asked her to document this in writing as best she could (see enclosed note) without jeopardizing her position with the Burlington Schools." There is an attached note —

MR. GALLAGHER: We'd like to invite your attention that Catherine Black statement which is just [70] before P-30, the last page of P-29.

Q. Now P-30 is the letter of July 10, 1979 to you?

A. Yes it is. This was the first time that Dr. Lot himself would state to us that Mike should be in a class specializing in learning disabilities, learning handicaps. Prior to this we had asked if he should go there and he said he wouldn't know until the psychological testing until he could examine all the records, etc. On this date he told us that this is where he felt that Michael belonged. The reason the Carroll School was mentioned instead of another school is because we had told him that we preferred the Carroll School over the other schools that we had looked at and that's why he singled out the Carroll.

Q. On your letter, P-31 is a letter from Dr. Levine dated July 25 and I think that that is self-explanatory unless there is something you wish to bring in.

A. Just to add to this that this was discussed in great detail with Dr. Levine with Michael brought down to Dr. Levine with a number of his records and his conversations at least the way it was explained to us, with Dr. Lot and others that his feeling was that Michael belonged in a class specializing in learning disabilities and again not for emotionally handicapped children. Again this is what we told Dr. Levine the class in Burlington was because this is what we were told.

Q. I'd like to invite your attention to document P-32 a [71] letter of August 1, 1979 over a signature of Dr. Lot enclosing a report of Dr. Sherman Isenthal, is there anything in this that you wish to bring to the —

A. Nothing except that this was his reinforcement of his previous position, possibly a little stronger, and he included (end of tape).

MR. BERMAN: * * * for the record the amount of time that Michael missed from school because of the illness that he sustained in February of 1979 which you previously described.

THE WITNESS: The exact time I'm really not sure of. What I can tell you is that the maximum it could have been was five days from school. I believe it fell around the February vacation and Michael was home on vacation that was out of school while he was sick. But per the school records he was only absent five days in the whole third quarter.

MR. BERMAN: Well wasn't he hospitalized for ten days?

THE WITNESS: I don't think it was ten days he was hospitalized for a number of days. The sickness covered a period of approximately ten. I think he spent maybe, well I don't think you'd call it a day in the hospital at the MGH, maybe ten hours or so at the Mass. General. He then spent

approximately five days at the Lawrence Memorial Hospital, in the hospital.

[Transcript of a portion of the administrative hearing held on October 30, 1979 before a Hearing Officer of the Bureau of Special Education Appeals of the Department of Education, Commonwealth of Massachusetts. The transcript includes the remainder of the testimony of Mr. Robert Panico, the father of the child, a witness called by the parents, found in the Record-Appendix, Volume III, pages 166-265.]

EXAMINATION OF ROBERT A. PANICO BY MR. GALLAGHER:

Q. Now once again for the record would you please state your name?

A. Robert A. Panico, P-A-N-I-C-O.

Q. And you are the father of Michael Panico?

A. That is correct.

Q. All right. And you have testified previously in this case?

A. Yes I have.

Q. Now inviting your attention to May 29, 1979, did you have a meeting with a Dr. Lot?

A. Yes I did.

Q. And did you discuss a report by a Mr. Cavanaugh with Dr. Lot at that time?

A. Yes I did.

Q. And did the doctor express an opinion about Mr. Cavanaugh's report?

A. I showed Dr. Lot the psychologist's report that was given to us, Richard Cavanaugh's report. He read it and immediately upon reading it he said that he felt that it was erroneous and certainly it wasn't conclusive and it wasn't indicative of * * *[1] sound judgment, it was nothing more than he would

[1 Asterisks appearing passim in this transcript indicate portions of questions and answers that were apparently unintelligible and therefore not reproduced by the stenographer.]

expect of any child with a learning disability. That the learning [167] disability would cause emotional problems but the emotional problems were not causing any learning disability.

Q. Did the doctor express an opinion, Dr. Lot express an opinion as to whether Michael should be put into a class for emotionally disturbed children?

MR. BERMAN: I wish to object to this. Dr. Lot has been a witness here and anything that Dr. Lot said or anything that he expressed would have been given while he was a witness and I don't think there is any need to have second hand evidence where first hand evidence has been available to the Hearing Officer and the * * *.

MR. GALLAGHER: I believe Dr. Lot already testified to that.

MR. BERMAN: Fine, then we don't need it a second time in that event and if Dr. Lot didn't testify to it then there is no need to repeat it now. I mean there's no need to get into it now.

HEARING OFFICER: In the interest of not having redundant questions and statements perhaps we can hear what * * * in a shortened kind of way.

MR. GALLAGHER: Well that's exactly what I'm trying to do is tie in the testimony from where it left off last time to get rolling again today. I don't think I'm being redundant by asking the question, you know, we're less than two minutes into testimony at this point.

[168] HEARING OFFICER: All right, let me overrule it and allow the question and the response to go into the record. If you want to * * * you do have the written statement for Mr. Panico so if you * * * can be used to highlight that or amplify it well then we'll go through it * * * * * *.

MR. GALLAGHER: O.k. Well just go ahead. Did he indicate?

A. Dr. Lot stated that he did not think Michael should be in a class for emotional children.

Q. And did he indicate at that time that he was going to refer Michael for additional tests?

A. Yes he did. He said to alleviate my and my wife's fears because we were told that Michael was depressive, almost to the point of suicidal, etc. and he assured us that there was nothing like that with Michael but just to reassure us and to make sure that there were no primary emotional problems he did refer him to Dr. Isenthal.

Q. All right now you've used the word "he" twice in that last sentence.

A. Dr. Lot.

Q. Did Dr. Lot say that he thought Michael was suicidal?

A. No, this was the — I would say this was an indication that my wife and I derived from listening to Jean Aaron and Dick Cavanaugh.

Q. All right. When you say he thought that Michael might be suicidal it was Mr. Cavanaugh.

[169] A. No, let me correct myself. We derived this opinion from the way Mr. Cavanaugh spoke to us and the way he expressed his opinion of Michael based on his psychological testing. I drew the inference to the point I questioned him on two occasions, is Michael suicidal. He never said Michael was. He said not at this time. That's Mr. Cavanaugh said. Not at this time, but that was one of my concerns that he could be, that there were any serious problems with Michael and that's what I expressed to Dr. Lot.

Q. And Dr. Lot said he didn't think there was anything * * *.

A. Right.

Q. All right. Now I invite your attention to the record the letter document P-27 and this is the letter from Jean Aarons to Mr. and Mrs. Panico of May 31, 1979.

A. That is correct.

Q. And this spells out that Jean Aarons had been informed that you had made a phone call on May 30th to her indicating your attempt to have Dr. Lot coordinate psychological acceptance for Michael through the MGH?

A. That is correct.

Q. Now I invite your attention to document P-28 and this is dated May 30th, 1979 from Dr. Lot to Dr. Levine.

A. Yes.

Q. Is there anything in that that you particularly wish to invite to the court's attention?

[170] MR. BERMAN: I object to that. If there is anything in that that Mr. Gallagher wants to * * * as an exhibit or anything Mr. Gallagher wants to invite to the Hearing Officer's attention he is welcomed to do so. I don't think there is any basis for Mr. Panico to decide whether he wants to invite the Hearing Examiner's attention to this letter. Mr. Panico is not yet qualified as a pediatrician or a neurologist.

MR. GALLAGHER: Well he's a qualified parent.

MR. BERMAN: Yes that's exactly what he is, a parent. The letter speaks for itself and if there is anything in it that you feel to be * * * in the letter then I'm sure the Hearing Officer will give you and me Mr. Gallagher and Miss Manoil the opportunity to amplify to our heart's content —

HEARING OFFICER: I think I will * * * I think that in terms of statements from Dr. Lot we have his complete testimony on record if there are things you wish to * * * look or * * *. I would prefer that Mr. Panico * * *

MR. GALLAGHER: Well in any event this letter is before the Hearing Tribunal.

Q. Now I'm inviting your attention to P-29 of the Plaintiff's exhibits. do you have there a document to Dr. Lot from Peter Shoenfeld on MGH stationery spelling out a certain assessment of Michael Panico?

[171] HEARING OFFICER: I have it here.

MR. GALLAGHER: All right. Now I'm inviting your attention to P-30, we have a letter from Dr. Lot of June 30th, July 10, 1979 to the Panicos regarding Michael Panico.

MR. GALLAGHER: P-31. These are all that you are familiar with. P-32 a letter over Dr. Lot's signature on MGH stationery to Robert Panico. P-33 — and oh incidentally, P-32 contains with it a psychological test report over the signature of Sherman Isenthal, PhD from the MGH and I believe the doctor has testified partially on that before.

HEARING OFFICER: That was the testimony from Dr. Lot —

MR. GALLAGHER: Right. Now P-33 you have a note obtained from Michael Panico — well tell us do you know what P-33 is?

A. Yes I do.

Q. All right. Please tell the court what P-33 is.

A. P-33 were records that I obtained from Michael Panico's special education folder. They were told to me to be the notes of the June 4, 1979 core meeting.

Q. Now have you reviewed these notes?

A. Yes I have.

Q. Is this reflective of what you understood took place at that meeting?

A. Not at all.

Q. Do you know who wrote these minutes or who wrote these notes?

[172] A. I'm not sure, I have an idea but I couldn't be positive who wrote them.

Q. Do you object to him saying who he understood wrote them?

MR. BERMAN: As long as the evidence is clear that it is from no more than his understanding.

MR. GALLAGHER: All right.

Q. Who do you understand wrote them?

A. I believe they were written by Myra Fornier.

Q. Now who was present at this meeting according to your memory?

A. On June 4, 1979 it was Myra Fornier, Sally Hennessey, Rebecca Silverstein, Catherine Black, Jean Aarons, John MacAlair, myself and my wife.

Q. Now under the notation on the second page of these note minutes there is a statement regarding parents. "Michael thinks he's dumb." Was that your only input into this meeting?

A. Absolutely not. My input was extensive and these — o.k. when I say my input was extensive I discussed Michael, my wife and I discussed Michael with primarily with Jean Aaron and also with John MacAlair. We talked, we had a discussion with John MacAlair as to what his class was and we also discussed with Jean Aaron my feeling that Michael didn't belong in a class for emotional children, that the doctors had given us preliminary indication that Michael's problems were not emotional and that what was this class gonna do [173] for him. I asked what it was gonna do for him with regard to a reading disability and learning disability. I was told that once he overcomes his emotion problems there won't be any problems with reading. There was quite a bit of discussion on it, none of which appears here. The only thing that does appears here is short notations which supposedly are summations evidently of the people who weren't even at the meeting. A lot of them were, some weren't.

Q. Now who was your liason with the core meeting?

A. To my knowledge the only person we ever had a liason with was Jean Aaron.

Q. Was there a concensus in your opinion from this meeting of Michael going to the Pine Glen School?

A. There was no concensus, there was no discussion, asking of anyone or anyone questioned or anyone's opinion asked. It was already assumed. I think it was Catherine Stone that Michael was going there. Jean Aaron stated that Michael was going to be going there. John MacAlair was there to explain the class, what he was going to be able to do for Michael and they made several remarks about how he would handle, you know, what his program involved. There was nothing whatever reflective of a discussion as to what Michael's best interests were, why Michael should go there or any indication why Michael should go there other than the fact that Jean Aaron had said that Dick Cavanaugh found Michael to have emotional problems which, because of which he could not concentrate and therefore couldn't learn.

[174] Q. Now you have previously testified that you had been told by Mrs. Black and also by a Mrs. Mead or Miss Mason that Michael should be in a special school for learning disabled children. Was any mention or consideration given to this at that meeting?

A. None whatever. Excuse me, I mentioned it to, it would have to have been to Jean Aaron, I mentioned that I was looking into the Carroll and the Landmark School and to date I didn't know what we were going to do. But it was mentioned yes, but it wasn't mentioned or discussed as part of the team meeting, it was talked to more or less after the conclusion of the meeting.

Q. Who made the decision to place Michael in John MacAlair's class?

A. Jean Aaron on May 25th.

Q. And that decision was made on May 25th?

A. Absolutely.

Q. Did you state that you rejected the plan that was offered to you pending input from Drs. Lot and Isenthal?

A. I don't believe that I said I rejected it. I possibly said that I would reject it. In fact I remember asking Jean Aaron if I could reject it and then if I felt that this was the class for him could I then — did the rejection mean he couldn't go there or what and she assured me that no, anytime I could change my mind. I did tell her that what I had to date I would be rejecting the plan for an emotional class for Michael until I got the conclusions from the doctors. I also at that [175] point asked if they could get the plan right out since we probably were gonna have a problem I wanted the plan so that I could reject it and go to a hearing prior to September so that we could straighten Michael out for the upcoming school year.

Q. Now I invite your attention to P-34. This is a report of Myra Fornier dated 6/5/79.

A. That is correct. This was a report we received, my son brought home in an envelope to the parents of and, it supposedly is a quarterly report of Myra Fornier who was the counsellor of Michael, and it said that counselling sessions proved unproductive in diminishing anxieties and depression which kind of, well at this point didn't shock us because we had heard from Dick Cavanaugh an emotional problems had all of a sudden cropped up, but prior to that we never heard the word depression, anxiety, etc. from a school counsellor or from anybody else related with the school system.

Q. And they indicated in that report that depression was related to school achievement?

A. Yes. They also indicated that maybe an alternative suggestion would be outside counselling — outside of the school setting.

Q. All right. On June 15th did you make a call to Jean Aaron and ask for an Ed Plan?

A. I called her office I did not speak to Miss Aaron, I spoke to her secretary and asked for an Ed Plan. I told her I was leaving, I was going away on business and I [176] would be

back in about a week but could she please have it there so we could get it to the doctor.

Q. Did you again make a call on June 27th to Jean Aaron and ask for an Ed Plan?

A. On June 27th I called because we had not yet received the Ed Plan. I had now become familiar with Chapter 766 and I realized that it was late, and I wanted to reject it. I called the Commonwealth of Mass. to find out how to go about it and they told me to first contact the school which I did. I told them that if I didn't receive it I would just send a letter stating that I rejected it as I understood it and request a hearing.

Q. O.K. Now I invite your attention to P-35. Would you please tell us where this document came from and what it is?

A. This document came from Mike Panico's Special Education Folder and its — it appears to be a note made by someone in Jean Aaron's office I would assume stating that I called and that I would be sending a registered letter to the Superintendent because the plan was not completed within the ten days after the meeting. Also I'm gonna reject the plan any way.

Q. Did you subsequently have a conversation with Jean Aarons or about this same time have a conversation with Jean Aarons about what Drs. Lot, Isenthal and Mrs. Black had said?

A. Yes. Jean Aaron called me back after I called her on the 27th and told me she was sorry the plan wasn't there but [177] that she would have it ready for me, she would try to have it ready the next day. I then told Jean Aaron that Dr. Lot, Dr. Isenthal, stated that Michael's emotional problems were secondary to a primary learning disability and that this didn't call for placing Michael in a class for emotional children but that he needed help for a learning disability. I also told her that I had conversations with Mrs. Black who stated that this class wasn't for Michael and it wouldn't help him and that I felt that placing Mike in a class like this might be detri-

mental and I asked if, you know, now that we have something from the doctors, the psychologist and your own teacher in the school system, do you think that's where he belongs? And she said she didn't agree with the doctors of Mrs. Black and she was recommending MacAlair's class.

Q. Fine. Did you get the Ed Plan finally on June 28th?

A. Yes my wife picked it up that — at the office, Jean Aaron's office.

Q. At that time was

(remainder of tape blank)

[178] (beginning of tape # 15)

A. O.K. We would be discussing the educational plan dated June — 1979 to June, 1980.

Q. * * * 1979 which is in our record here as P-11.

A. My reasons for rejecting several — the first thing is I became familiar with Chapter 766. Now the participants, Mr. Cavanaugh, Miss Mead and Miss Mason weren't there when the educational plan was developed and we never had a chance to talk to them about the educational plan or anything else. At the June 4th meeting there was no inflict [*sic*] as to an educational plan by Becky Silverstein, Mrs. Hennessey or my wife or myself. That s the first thing. The second thing was after what had happened with Burlington in the past changing Michael's education plans, etc. without our knowledge, the educational plan wasn't even signed by the principal of the school. These were minor points but they were important to me at the time. Further the plan did not seem to be reflective whatever of my son. An example of that is in the performance * * * which I believe I labeled as Ed 10, the performance level of Mike Panico, Mike has a sight vocabulary of at least 200 words. He has no sight vocabulary anywhere near 200 words. Michael

is able to use the suffix sed, ing, y, ly, s, ss, tion, etc. He can use the prefixes re, un, dis. Michael can't do any of that. Michael can't read period. He can't read at all. Michael knows the vowel combinations, ay, ai, plurals f to v, y to i, etc. [179] He absolutely doesn't. His performance level just is not Michael. The next thing is that if I just relied on what the school, the testing and what the school had done, I would have to refer to, going back, Myra Fornier in P-34 stated that counselling was unsuccessful and she also said in the same thing that counselling in a non-school setting is probably what would be appropriate. Yet no where in the Ed Plan did they discuss counselling. There is one area, item 11, to be able to express feelings, primary No. 11, General Objectives, and its the only thing not even spelled out in the Ed Plan, there is no provision for any, anything dealing with Item 11 and yet that's the only thing that had to do with any kind of counselling and yet its not addressed. The next thing is P-36, Michael's teacher, Sally Hennessey, taught Michael for two years. In 2D of Exhibit 36 Sally Hennessey states he is easily distracted and prone to inattention. Everything that I have read discussed and we've been told about learning disabilities from doctors, from the Burlington School System and anyone else is that distractability is one of the most easily recognized characteristics of a learning disability. She spells it out and yet there's nothing addressed to a learning disability in the whole educational plan. Further, Miss Hennessey said that Michael's at grade level in math, social studies, science, writing, and yet the Ed Plan called for at the time is in a class for a primary adjustment class where he takes everything in [180] a primary adjustment class and yet the school itself was telling us that he was at grade level in math, he was at grade level in science, reading, I mean writing, etc. and yet they prepared an Ed Plan which they're saying is least restrictive but they're putting him in a class not putting him with anyone else. She also says that he

needs a small group instruction. I agreed with that part of it. But she also says at the same time that he's at grade level or above in math and that they made no provisions except to put him in a special class even for math.

Patricia Mead's statement on her testing on P-37, is direct conflict to what the psychologist stated. She said throughout testing Michael was cooperative, friendly. He became distractable at times, he was not anxious during the testing and he did not become frustrated with any of the tests. That's a complete contradiction to the psychologist's report where at page 4 and 5 in the Ed Plan it says at the bottom "the perceived negative attitudes concerning academic competence contribute to him questioning his self worth and cause him to be anxious, sad and angry. This cycle of negative attitudes and feelings caused depression and result in Michael's difficulty to focus attention on tasks and to observe sufficient energy for tasks completion to meet with success. That's the learning constraints on Michael yet it's completely opposite of what's said by, so far by Sally Hennessey [181] and Pat Mead. And then by Gail Mason in P-38 who also tested Michael and her comments on Page 2 were Michael was friendly and responded appropriately to all the tasks that were presented to him. He was calm and relaxed and displayed a sense of humor during the testing period. Again I'm not indicative at all of emotional disorders or a class that calls for primary adjustment, and completely opposite of what we were told on May 25th by Jean Aaron and Dick Cavanaugh where Michael's whole problem was his frustrations, the fact that he was anxious and that he had severe emotional problems. Also on both Mason and Mead at the conclusions questioned Michael's memory problem which is a prime characteristic of a child with a learning disability and yet there is nothing addressed in the Educational Plan to deal with his memory problem. Now we have had discussions with Miss Mead and Miss Mason subsequent to the,

I think it was the May 18th meeting, and I forget again who, which is which and right now I don't know, where they told us that memory is one of the things that no one knows too much about and what part of the brain even controls it, or what you can do about it. At that time nobody ever said emotional, nobody ever mentioned emotional problems or the cause being emotional. The memory things aren't addressed in the Educational Plan. On P-39 Becky Silverstein states that Michael appeared to be at ease and stated that he remembered doing this before. He further stated that it [182] was easy and kind of fun. Michael asked how he did after each test was completed. Again, no indicative of emotional problems which is what we were told this whole Ed Plan had to do with. Miss Silverstein also states that Michael's oral read is at a slow labored pace. A limited sight vocabulary hinders fluency of reading low level materials. Based on the types of errors made Michael appears to rely on the shape of the word rather than focusing on the letters in the word. Well that indicated to me that Michael had a problem reading and no where in that educational plan other than a statement to obtain grade level reading skills or to apply mastered phoenetic skills, is there anything which spells out a way to help Michael. In fact we had asked Jean Aarons what kind of help Michael was gonna get for his learning disability and we were told at the May 25th meeting that once Michael's emotional problems were out of the way he'd be able to read. He didn't have a question whether he had a learning disability. Becky Silverstein, the reading specialist who tested him, as a general objective said to raise reading level and yet they wanted to put him in a class which is by its own name, its a primary adjustment class. It just didn't seem appropriate to me.

The second psychologist's report which I indicated earlier, Mr. Cavanaugh told us it was a bad testing situation. Yet we were supposed to make a [183] decision on my son's life based

on a bad testing situation, admitted to by the psychologist, and which, I think emphatically I have to state, was the basis for the educational plan. We were told prior to any meeting where Michael was gonna be placed and that we were told that it was gonna be based on this psychologist's testing to the point that at that same meeting we were told that —

HEARING OFFICER: By whom did you — were you told this * * * was gonna be based?

MR. PANICO: Jean Aaron. Jean Aaron on May 25th. We were told at that same time that they wanted Michael out of the Memorial School. He should have been taken out earlier but they couldn't do it because it was the school closest to his home and now that they had this psychological report they could do it and they said Michael had Memorial School Syndrome. Mrs. Aaron then told me she was going to tell me something and if we were ever sitting across the table as adversaries she'd lie to it and Dick Cavanaugh said he would swear to it. She told me that Michael was ruined by Dick Barrows, that Dick Barrows the way he ran the school and the way he handled the Special Ed Program ruined Michael and he ruined many other kids. She told us why she wanted Michael in John MacAlair's class was to get him out of the Memorial School. Other reasons for rejecting it. I talked to my wife and I to John [184] MacAlair very briefly at the core meeting on June 4th not because he was sitting there and not because I observed him at the class, if anything that I saw good about the plan it was him. And that was the only thing that kind of made me still wonder as to whether or not we should maybe consider the plan but he also stated that it was the primary purpose of the class was for emotional adjustment problems and that he did offer a reading program but — you know, on an individualized basis, but he had seven or eight kids in the classroom and the primary purpose was emotional. He also — I also called John MacAlair in the summer in July

and talked to him on the telephone after I had gotten the doctors' results and I asked John MacAlair if now that he heard what the doctors had to say, that Michael did not have primary emotional problems, did he still feel that he could service Michael and he didn't give me a definitive answer as to whether or not he could service him but he did say that if Mike didn't want it there would be nothing he could do to help him. If Michael and the parents did not want it there would be no sense putting Michael in that class because he would get nothing out of it. I asked him if he had training in learning disabilities and he said he had minimal training in specific L.D. problems.

Also with regard to the educational program, I stated earlier Michael was supposedly at [185] level in math and other things but there was no provision for Michael to be integrated with the other children I think except in lunch and in some gym. But even in the physical education portion of it, Michael's a gifted athlete, a phenominal little athlete, and yet he wasn't even, he was even gonna have an adapted physical education. Also for three years we've received reports from Myra Fornier, teachers, etc. and no one ever suggested that Mike had an emotional problem to us or anything that might have interferred with his learning. We were told by teachers that he might have had a learning disability or we were told at the end of the first grade that he had a learning disability. We saw that Michael had improved when he was getting help under an educational plan prior to its being changed. We saw the improvements that were made, they're recorded within the school records by Jean Aarons, by the teachers, when he was under Mrs. Black for the full hour and I couldn't see anything in this plan that did anything to offer Michael a chance to be educated, all I saw it was a place to put him. I couldn't even rely on the emotional problem situation based on what the doctors had said because if he had this why wasn't he having

problems in all the other subjects. Also a Burlington Teacher, Catherine Black, was emphatic that we would hurt Michael by putting him in that classroom. Not only we wouldn't help him we would hurt him. She had had Michael for a year and a half and I had to rely an [186] awful lot on her. Based on all of that I just on the school's end of it I couldn't see that the plan was in any way adequate or appropriate. Besides the school records that we tried to use to examine the plan we also talked to Dr. Lot who was insistent that Mike's problems were a learning disability, not emotional, Dr. Levine, Mike's pediatrician, who thought it would be very harmful if we put Mike in with children who had emotional problems where he was so easily distracted, Dr. Isenthal who said Michael's emotional problems are consequential to learning and they — being in a class with disruptions would hurt him. He needs success in a classroom as normal as possible where everybody is like him. Peter Schoenfeld, Director of the Planning Disorders Unit at the MGH, when I explained the class to her, said that a dyslexic child needs a routine, he needs an ordered classroom, not a class where there are distractions nor anything that resembles an open classroom type atmosphere which Mr. MacAlair's class certainly is. He needs a routine, he needs everything ordered for him and he needs such repetition. He needs to be taught by people specializing in L.D.

Finally, I knew my son. Michael did not want it. This was presented to Michael in June that Michael might be going to the Pine Glen School. From the time it was told to him up until the time in August when we finally told him that he didn't have to go there it raised havoc with his life. I mean that sincerely. [187] He said it was a school for retards. He, like everybody else — child in the Town of Burlington, knows that the Pine Glen School, if a kid goes there from other than in the area he's going for a reason. He's going because he has a problem. Michael came home one time telling us that the kids

called him a weirdo because he was going to go to the Pine Glen School. He didn't want it. He told us he would run away. He told us he wouldn't go to school, he'd go back to the Memorial, he'd do anything. And here was the school telling us that he had an emotional problem and yet they were causing more emotional problems than they were even attempting to cure.

Finally, what Burlington had done in the past. They had a core, they never gave us an educational plan, we had to expend our own funds to have him te sted. We finally got a new core, a program was set up or Michael which was never followed, it was changed afte Michael was making progress, it was changed deliberately with the principal and the counsellor's knowledge. I had had assurances from Mr. Foley that Michael's plan wouldn't be changed but it was changed anyway. Why Mr. Foley even went so far as to give me his assurances in writing. And then it was changed. I saw Michael go — regress, his reading regressed. Michael regressed, he became constantly headaches. He suffered through two years as a result of the Burlington School System. Finally, I felt that, you know, we had blown it. [188] Michael had, if he was taken care of in the first or second grade, I think he had an 84% chance of being remediated or being correct, his problem. When you go to the fourth grade it drops down to 44% and I just couldn't wait till it went to the sixth grade when it drops down to 5% chance of success. Burlington had the problem, was aware of the problem, had a medical diagnosis in the first grade of dyslexia which is part of the core and did nothing about it. I feel they've ruined him and I couldn't accept their Educational Plan. There was nothing there that was gonna correct or help him and we had to make a decision, the decision was made that the Carroll School, what they could offer, was what Michael needed based on the most sound medical advice and educational advice I could get. I told you I talked to —

spoke with Sally Smith who wrote this book "No Easy Answers" who told me a class as I described it to her would kill him. He has to be in a classroom where there are no disruptions, where his whole day is ordered instruction. He can't be left on his own. He can't be left to work on his own if he is severely learning disabled. I think we've already stipulated to the fact that he is and based on that I had to reject the Educational Plan.

Q. Does the Educational Plan spell out any way for measuring how it's succeeding in the course of the year that it's established for?

[189] MR. BERMAN: Objection. The plan is * * *.

HEARING OFFICER: Do you want to reword that?

MR. GALLAGHER: All right.

Q. Do you also object to the Educational Plan because it does not spell out any way to measure its progress in the course of the year?

A. Yes. Absolutely. One of the things that —

MR. BERMAN: I believe the answer to the question was Yes.

HEARING OFFICER: I will allow the * * *.

A. The Educational Plan for Michael was very similar with the Educational Plan we received the year previously. It had objectives, primary and specific, but no measurement factor. This is what happened with his first educational Plan. We went through a whole year of being told Michael was improving, Michael was improving and at the end of the year we were hit over the head that Michael had regressed. Again at this time we were asked to accept the Plan with no measurement, nothing that we could see or any way we could measure whether or not Michael was improving. In fact that was one of the things brought up with Miss Aarons when she asked us to give the plan a year, try Mr. MacAlair's class for a year and if it didn't work then they wouldn't object to if we wanted to put him

in the Carroll School. But I couldn't take that chance in not [190] knowing whether or not he was going through another year of going through hell.

Q. Now Michael's been at the Carroll School for about six weeks?

A. That's correct.

Q. Do you have an opinion as to whether the Carroll School has been advantageous for Michael?

A. It's been phenominal for Michael.

Q. Now do you feel that as a father you've put undo pressure on your son over the years?

A. In the first grade I would have to say for the first three or four months of the first grade I did. I expected him to be like his sister. I thought he was gonna be — he always seemed very smart, and I thought he was gonna be extremely smart in school, yeah. I told him he was lazy, he didn't try, etc. up until probably around December or January of his first grade.

Q. What is your feeling about your son's failure in school?

A. Frustrated. I feel for him what he's gone through. It's very easy to sit here and say you know, the little boy doesn't know what he wants and everybody is gonna make the right decision for him, but nobody has to see him every day, my wife and I do. He's hated school. He's hated school from the first grade up until the present year. He come's home not wanting to go to school. He didn't want to go back to school. He's developed headaches, whether or not they are a result of the school or whether he would have developed them [191] anyway I don't know. He suffered immensely, suffered both physically and emotionally. When a little boy tells you that he'll run away or that he'd rather be dead or that life's not fair and he's only in the third grade, I'm frustrated. I'm frustrated that the Town did nothing and the Town was well aware of what was going on and did nothing about it.

Q. Now are you yourself active in youth activities in this area?

A. Yes I am.

Q. And what activities are you interested in, or active in?

A. I'm on the Board of Directors of the Burlington Hockey and Skating Association. For a couple of years I ran the Hockey Clinic and coached the Hockey Clinic in the skating * * * in the Town of Burlington and I've also coached in the Little League.

Q. Now is your wife also active in Parent Teachers Organization activities here in Burlington?

A. She was a, or she is a member of the PTO Board of Directors, she has been for a couple a years and she was an aide in the Burlington School Systems for I believe six years, prior to being on the Board in classrooms where our children were not.

Q. Does she presently have an activity in the volunteer program at the schools?

A. I believe as a member of the Board I think she runs the volunteer program for the Burlington School System [192] at the Memorial School.

Q. Now in the course of the years that your son had been in the school, were you ever told that he was a behavioral problem?

A. The one time in the second grade Janet Hannon I believe, at the conference, the second conference we had with her, I believe it was November and the year would have been I believe 1977, it was the second grade. When she told us Michael should go back to the first grade and we told her about the problems and she stated that he was also a discipline problem. I asked her what he had done, what she meant and I said was he fresh to you and she repeated no, but she did say he shuffled his feet, he shuffled papers, he daydreamed, he would tap a pencil on the desk, etc. He would get up and get drinks of water, he'd go the bathroom a lot, etc. and I said to my feeling I didn't consider that a discipline problem and

she said well she certainly did that it wasn't her job to control the children that way, he should know enough to sit at his desk and do his work.

Q. In September of 1977 and up to the end of the second grade did you make several phone calls to Miss Jean Aarons?

A. Yes I did.

Q. And what was the purpose of these phone calls?

A. In, I have to precede to June of the first grade, we had a core meeting and we were told Michael had a learning [193] disability which would be taken care of. The reason for our calling Jean Aaron in September was to clarify what grade Michael was going into and to make sure that he got the help. Again every subsequent call up to the March core was because we were under the impression that Michael had the problem and Jean Aarons was handling it. We called her. Dick Barrows had told us once we had the core that it was out of his hands it was now in Jean Aaron's hands and Jean Aarons always responded. It was my feeling that Jean Aarons was aware, was handling it. I think I even contacted Jean Aarons in December when Michael started — when we took him tc the MGH to Dr. Lot and I think you'll find notes in defense on the Town's exhibits stating that the call was made to her in December telling her that he was gonna be tested additionally, etc. We were under the impression that Jean Aarons was the person to deal with for a learning disability which we were told Michael had.

Q. Now how did you obtain the notes marked P-24 of May 18, 1979?

A. The notes consisting of three pages were obtained by me from Jean Aarons in August subsequent to a mediation hearing with Mr. Foley, Mrs. Aarons, yourself, myself and my wife were present. We went through Michael's Special Education Folder and took out the documents, asked for copies

of certain documents and we came to these three — there were three pages together, they had [194] an attachment with a persons name on the left hand corner which we've discussed but Jean Aaron said the notes didn't relate to Michael Panico. Because of the terminology in the notes they struck my attention. I asked her what they were. Jean Aaron said they were the notes of the May 18, 1979 meeting, core meeting, team meeting. We questioned the first page where we said they didn't apply to Michael and she agreed and said they were in there in error and they would be taken out. The second page relative to the needs for counselling Mystic Valley, flakes in and out in the process, etc. she said did not apply to Michael and the third page where I mentioned the top of the page where it says father telephone call with Mason and Miss Mead that I told her we never had any conversation on that date, a telephone call, and she said that's right, she had put that note there because she had wanted to call me relative to what Miss Mead and Miss Mason had stated on that date but she held them out all three, they were all together, they were all the same exact paper, and its the only paper like that I believe that was in the entire folder and they were held out to be the notes of the June, I mean the May 18, 1979 meeting. And she was emphatic that that's where they were, even to the point of telling me that the telephone call was something that she meant to make to me.

Q. O.K. Now on page three of that note the words on some [195] sort of doodle on the right hand side appear, Landmark Carroll.

A. That's correct.

Q. When was the first mention that you made of putting your boy in the Landmark or Carroll School?

A. I never mentioned to Jean Aaron prior to May 25th when we met with Mr. Cavanaugh. This was brought up, Landmark and Carroll was brought up either during or immediately after

the May 18th meeting. It was brought up by the — where the Landmark or Carroll came from was one of the teachers. Now whether it was said to us during the meeting itself or it was said immediately after, I don't recall. Miss Mead and Miss Mason, we were there discussing it. We were discussing it with both of them together and individually, we also discussed it with Catherine Black after the meeting but whether or not it was discussed during the meeting or after I cannot be sure.

Q. Did Miss Mead or Miss Mason ever recommend John MacAlair's class? Or did they recommend it on May 18, 1979?

A. On May 18 Mr. MacAlair's class was never discussed. In fact, on May 18 all Miss Mead and Miss Mason ever said was they had no idea what Michael's problem was. One of them even went so far as to tell us that she knew a psycho-neurologist who could possible help because memory was something they didn't know too much about and maybe it was something that happened in the past. [196] You know, a long thing went on because of the issue with memory but nothing about emotional or John MacAlair's classroom as a matter of fact was ever discussed.

HEARING OFFICER: Is that the end of the direct?

MR. GALLAGHER: That's the end of the direct, yes.

(EXAMINATION OF ROBERT A. PANICO BY DAVID BERMAN)

Q. Mr. Panico, where did you first hear the name John MacAlair?

A. May 28th of this year.

Q. And isn't it a fact that at that time Mrs. Aaron suggested that you make an appointment to go to Mr. MacAlair's class?

A. Yes she did.

Q. And did you go to Mr. MacAlair's class?

A. No I did not.

Q. In fact you didn't go to Mr. MacAlair's class, did you, until after you had placed your child in the Carroll School?

A. That's correct.

Q. * * * Mr. MacAlair's class you had signed a contract with the Carroll School?

A. That is correct.

Q. And under that contract you were obligated to make certain payments to the Carroll School, is that not correct?

A. That is correct.

[197] Q. And under that contract you were obligated to make certain payments to the Carroll School, is that not correct?

A. That is correct.

Q. And how much were those payments sir?

A. Approximately $3,500 at that point.

Q. And that would be true even if you took Michael out of the Carroll School at that point?

A. I would think so, I don't really know but I think it would just stand to reason, yes.

Q. And you will agree with me, will you not, that at the time you went to Mr. MacAlair's class you went to the class to see why that class was not going to be satisfactory for your child?

A. No I did not.

Q. You went there with an open mind, didn't you sir?

A. Absolutely.

Q. And you were prepared to come back in today to testify that the class was suitable even though you had already committed yourself to paying money to the Carroll School if you found it suitable, isn't that right?

A. I wouldn't have wanted to, but I would have.

Q. Where were you born sir?

A. Boston.

Q. What part of Boston?

A. I have no idea.

Q. Where did you live? During the first five or six years of your life?

[198] A. Medford.

Q. Where did you go to high school?

A. Malden Catholic.

Q. And where did you go to elementary school?

A. In Malden, Immaculate Conception.

Q. Junior high?

A. There was no junior high that was grades 1 through 8 and then High School 9 through 12.

HEARING OFFICER: How * * * is this relevant?

MR. BERMAN: I want to get the background of this witness.

Q. And did you go to college?

A. Yes I did.

Q. Where did you go to college?

A. I got my Bachelor's Degree from Boston University, Master's Degree from Suffolk, and accounting credits came from Boston University and Metropolitan College and other advanced courses at Boston University.

Q. What did you get your Bachelor's in?

A. Business Administration.

Q. And your Master's?

A. Business Administration.

Q. And are all your advanced degrees in business administration?

A. Not advanced, they are not degrees the other courses, they're in accounting and * * * economic theories.

[199] Q. And by whom are you employed?

A. Treasury Department I.R.S.

Q. In what capacity?

A. Supervisory Criminal Investigator.

Q. How long have you been employed there?

A. Fifteen years, almost fifteen years.

Q. Do you have any people work under you?

A. Yes I do.

Q. How many?

A. Fifteen-eighteen. Approximately fifteen right now.

Q. And do any of these people have people working under them, those fifteen people?

A. Not really, no.

Q. And its fair to say, isn't it, that the people you — who work for you you're accustomed to their carrying out your orders?

A. Yes.

Q. Now you were disappointed, were you not, when Michael didn't do well in the first few months of elementary school?

A. Absolutely.

Q. And you wanted to find out why he didn't do well?

A. That's correct.

Q. And your other, your daughter had done well in elementary school, had she?

A. Yes she did.

Q. And your son had done well in elementary school?

A. He wasn't in elementary school.

[200] Q. Hasn't been in elementary school yet?

A. No he is now but he hadn't been at that point in time that you're referring to, the first grade.

Q. And would it be fair to say that the — after the first four months when Michael wasn't doing very well you thought that maybe there was — maybe the school was at fault?

A. Not at all.

Q. Well who'd you think was at fault?

A. Michael.

Q. You said the first four months you thought he was at fault, isn't that right?

A. Yes I did.

Q. Well what did you think after the first four months?

A. After the first four months I thought there was a problem with Michael. I thought he had a problem.

Q. What kind of problem did you think he had then?

A. I didn't have the terminology for it, I felt it — there was something prohibiting him from learning, there was something interferring with the learning process.

Q. All right. When did you present the teacher with the book Square Holes, Round Pegs?

A. I never presented a teacher with it at all.

Q. Who'd you give that book to —

A. I didn't give it to anyone.

Q. Never had — did you ever suggest that that book be read by someone?

A. Yes I did.

[201] Q. Who'd you suggest it to?

A. I suggested it to Mr. Foley.

Q. To Mr. Foley.

A. That's correct. Not that he read it, that it be given to the teachers. I offered to buy it.

Q. Which teachers did you think it should be given to?

A. All of them.

Q. And what did Mr. Foley say to you when you made that suggestion?

A. I don't recall. It wasn't accepted but I don't recall what he said relative to the suggestion.

Q. Did you make that suggestion as a perfectly straightforward suggestion sir?

A. I made it out of concern. I felt that after I read the book and I'd read a couple of others at that point in time I felt that maybe people weren't as familiar with it as they should be, especially teachers.

Q. You felt you were something of an expert on the educational system, didn't you sir?

A. Not at all.

Q. You were going — you were suggesting to Mr. Foley that his teachers should read certain books weren't you?

A. I suggested that book should be read, yes.

Q. Now did you ever show the educational plan of the Burlington School to Dr. Lot?

A. Yes he's seen it.

Q. When did he first see it?

[202] A. At the hearing here.

Q. Did you show it to him sir?

A. No I didn't.

Q. All right. In fact the answer to my question Did you ever show the plan to Dr. Lot was no, isn't it? You never showed it to him.

A. No, I did show it to him. I discussed it with him after — o.k. I did not show it to him prior to this hearing, no.

Q. And its fair to say that you were surprised when Dr. Lot was shown the plan by me were you not?

A. Not at all.

Q. And were you surprised when Dr. Lot said that the plan was a good plan?

A. I didn't hear that testimony.

Q. You didn't hear that testimony.

A. I don't believe that was his testimony.

Q. Did you show the plan to Dr. Levine?

A. No I did not.

Q. Did you show the plan to Miss Shoenfeld?

A. No I did not.

Q. Did you show the plan to Dr. Isenthal?

A. No I did not.

Q. Did you show the plan to Sally Smith?

A. No I did not.

Q. So you've discussed Michael with all of those people but you never showed any of those people Michael's educational plan, isn't that correct sir?

[203] A. I was not given the educational plan by the Town of Burlington when I talked to them. They were late, I had nothing to show them.

Q. I see. When was the last time you talked to Dr. Levine, sir?

A. Oh, maybe about a week and a half ago.

Q. When did you get the educational plan?

A. I got it in June. July, I'm sorry. I think — June or July, the 28th of —

MR. BERMAN: The 28th of June wasn't it sir?

A. The 28th of June. I'll make sure.

Q. Well now tell me, how many times after June 28, 1979 did you talk to Dr. Lot?

A. I don't recall. Possibly two, prior to the hearing that I talked to him.

Q. And how many times after June, 1978 did you talk to Dr. Levine?

A. Possibly once that I know of.

MR. GALLAGHER: Since June of 1978?

MR. BERMAN: June, 1979.

A. Once.

Q. And was that time to ask him for this letter that was given up to us today?

A. No at that time I called him and asked him if he would be willing to testify, was he familiar with Michael, was he familiar with the testing that had been done, did he have expertise in this field, and would he be [204] willing to testify and/or provide a statement and he said yes.

Q. Did you ask him whether he would testify?

A. Yes I did.

Q. And what was his answer to that?

A. That he wouldn't.

Q. And are you making arrangements to bring him in as witness.

A. No I'm not.

Q. And will you explain why not?

A. On advice of counsel we are not bringing him in.

HEARING OFFICER: This is Dr. Levine you're referring to?

MR. BERMAN: This is Dr. Levine.

Q. Now when did you last see Dr. Lot?

A. The date of the hearing.

Q. That was September 10, 1979 I believe, was that correct?

A. That's right.

Q. And how long after the — did you see him after the hearing?

A. Well maybe for about ten minutes.

Q. Have you talked with Dr. Lot on the phone?

A. No I have not. I'm sorry. Yes we — I didn't. I don't know if it was myself or my wife. I put a call into him, I believe my wife talked to him, I didn't.

Q. All right, when was that sir?

[205] A. Probably a week or so after the hearing.

Q. And did you listen while your wife talked to him?

A. No I didn't.

Q. But you made the call?

A. I called originally, that is correct.

Q. And you handed the phone to your wife, is that correct?

A. No, no. I called he was not in. When he called back he talked to my wife.

Q. Did you find out from your wife how long the phone call was?

A. No I never did.

Q. Well why did you call Dr. Lot a week after the hearing?

A. It was because of Michael's headaches. And he called to the — Michael's medication is being changed pretty regularly and diets, that sort of thing etc. It was just a matter of calling him relative to Michael's physical and I don't think this thing was at issue at all.

Q. Oh wait a minute. Is it your testimony sir that one week after this hearing, that is on September 17, 1979, Michael was still having headaches?

A. Michael has had headaches since he's been seven years old.

Q. He's having them right now, isn't he?

A. The last three or four weeks they've been super, no. * * * occasionally yes, he will have a headache. He'll have a minor headache. They are minor now and when they get bad they ease up.

[206] Q. And you called Dr. Lot on September 17, 1979 to talk about Michael's headaches, is that right?

A. I don't recall the date, I said —

Q. Around that time.

A. Around that time, yes.

Q. All right. Now did you ever call Dr. Lot to talk about your objection that you've testified to today to the Burlington Educational Plan for Michael?

A. No I did not.

Q. Did you ever call Dr. Levine to tell Dr. Levine about your objections to the Burlington Educational Plan?

A. No I did not.

Q. When did you first learn about the program at the Pine Glen School sir?

A. That would be May 25, 1979.

Q. And up until that time you did not know that there was any such program at Pine Glen, is that correct?

A. I'd have to say no because I — you know, a specific program no I didn't.

Q. All right. It's fair to say that prior to May 25, 1979 you had never heard that there was a program for children with emotional problems or learning disabilities at the Pine Glen School?

A. Oh no, I was well aware that there were classes up there for children with emotional problems.

Q. You were aware of that prior to March 25th?

A. Yes sir. Yes I was.

[207] Q. And how long had you been aware of this?

A. Oh, maybe a couple of years.

Q. You were aware of this from about 197 — you were aware of this from mid 1977 onward?

A. I said a couple of years. It could have been '75-'77. I don't recall exactly, I was aware. That there were special classes up there and emotional was one of them, yes.

Q. And what had you heard prior to May of 1977 about those special classes there?

MR. GALLAGHER: I think a question that's a little bit broad, isn't it? Why don't you —

Q. What did you hear? I want to know what you know about it?

A. Prior to 1977 I —

Q. I'm sorry, prior to May of 1979?

MR. GALLAGHER: What did he hear or what did he know?

MR. BERMAN: What did he hear? Hear.

Q. What did you hear about it?

MR. GALLAGHER: That's too broad.

HEARING OFFICER: * * * a bit. How can he manage to repeat conversations that he may have had * * *.

MR. BERMAN: I just want to find out what he heard.

Q. What did you hear about those classes at Pine Glen School.

A. You're saying particular classes. I can't answer it as a class I can answer that I was aware that the Pine Glen [208] had serviced children with problems. That it had classes for children with several different kinds of problems. I was aware of that as a resident of Burlington. There were newspaper articles that you read that a lot of things reflective of the fact that Pine Glen catered, at least a lot of programs were involved at the Pine Glen.

Q. Did you hear derogatory remarks made about children who were in those programs?

A. No.

Q. Did you hear derogatory remarks made about the programs themselves?

A. No.

Q. Now do you think its possible sir, that anything you may have said during and prior to the summer of 1979 gave Michael the impression that the Pine Glen School was not a very desirable place to go?

A. Absolutely not.

Q. Impossible that these things had happened?

A. Impossible.

Q. And your opinion is that if Michael got a bad impression of going to the Pine Glen School he picked that up from other children, is that right?

A. Absolutely.

Q. And certainly not at home?

A. No he didn't get it from myself and my wife, maybe from my children.

MR. BERMAN: Excuse me?

A. Maybe from my other children, that I don't know.

[209] Q. Have you asked your other children?

A. No I didn't.

Q. Did you ever — strike that. You asked Mr. MacAlair at some point whether he could do anything for Michael, is that correct?

A. That is correct.

Q. And what did Mr. MacAlair say to you?

A. He was asked that question twice.

Q. When was the first time you asked him?

A. The first was in the summer of 1979.

Q. All right. What — and this was by telephone?

A. Yes it was.

Q. And you called him at home sir?

A. Yes I did.

Q. And how'd you get his home number?

A. I think I just looked up John MacAlair in the telephone book. I called a number and somebody said he's, this isn't him and he's in Medford, if I'm not mistaken, the one you want. I called and asked is this John MacAlair the teacher in Burlington?

Q. And did you introduce yourself when you called?

A. To Mr. MacAlair, yes I did.

Q. And what did you — what did Mr. MacAlair — what did you say to Mr. MacAlair and what did he say to you in that conversation?

A. To the best of my recollection I think I told Mr. MacAlair that I was rejecting or thinking about rejecting the educational plan as proposed. I told him it was [210] nothing personal. I explained that we had talked to — Michael had been examined by Dr. Lot, Dr. Isenthal and we had input from the Learning Disorders Unit at the MGH. My first question to him was if knowing that he has — if I were to tell you that the doctors diagnosed it was emotional problems were secondary and not primary, that Catherine Black said he didn't belong there, he had a severe learning disability, would you still feel that that was the best place for Michael. He did not to the best of my knowledge say yes or no or anything to that effect at that question. I think he kind of maybe gave me a vague answer or maybe he couldn't answer, I don't recall. I then asked — then we talked about his class. I asked about his background — was it in learning disabilities. He had advanced courses beyond his Bachelor's and I believe that he had one, the way I remember it, maybe one, maybe two specific courses in learning disabilities and the others weren't. The others were advanced courses in maybe children with problems but not specificly dyslexia. And he also did tell me though it was something the parents and the child would have to want. He works very closely with the parents and the child and he said if

Michael, and I told him of Michael not wanting to go, the fact that he was crying about it, the kids were calling him weirdo and retard because he had to go to that school, that you know, would that effect, would he still be able to help Michael and his answer to me was if the boy or the [211] parents don't want it there would be nothing he could do to help him. They both had to want it for it to be a success.

Q. Do you think sir that would apply to the Carroll School as well?

A. I would say —

MR. GALLAGHER: I'm sorry I don't understand the question at all.

Q. Do you believe sir that that would apply to the Carroll School as well?

MR. GALLAGHER: I don't believe that asking the question louder resolves an objection.

HEARING OFFICER: All right. Is your objection related to the question?

MR. GALLAGHER: Well the last question was what was the nature of the conversation between MacAlair, Mr. MacAlair and Mr. Panico over the phone. There's some answer from Mr. MacAlair, a summary of conversation and then the question is that does that apply to the Carroll School as well. Does what part of the conversation apply to the Carroll School?

MR. BERMAN: All right.

Q. Do you believe sir, since you've testified at some lengths to your beliefs, that the statement that the child will not succeed in the school unless the parents and the child wanted it applies to the Carroll School as well?

MR. GALLAGHER: I would like to interpose another objection. He is quoting from what — [212] Mr. Panico's quote from Mr. MacAlair —

MR. BERMAN: Yes, I know that and I —

HEARING OFFICER: All right. Is the question that you want to ask of Mr. Panico the question that does Mr. Panico

believe that the desire of the parents that the child have successful periods at Carroll that they be interested in the child's success at Carroll.

MR. BERMAN: That's right.

HEARING OFFICER: O.k. You may answer.

A. I absolutely believe that if both people want something or the child wants it especially its gonna have an effect on how he learns.

Q. So you would agree with me, wouldn't you, that there was nothing that Mr. MacAlair said regarding the effect of the child desire or the parents desire that took you by surprise?

A. Yes it did.

Q. It took you by that — you were surprised when Mr. MacAlair said that his class wouldn't work if the child or the parents didn't want it?

A. Yes I was.

Q. Because you were of the opinion that Mr. MacAlair should have said I will succeed with this child whether he wants to learn or not and whether you want him to be here or not, isn't that what you expected him to say?

A. Not at all.

[213] Q. Well would you explain why you were surprised when he said it?

A. I was surprised because Mr. MacAlair had told me, had told us previously in June and we had been told by other school personnel that the class was for emotional children and I was surprised when — that a class for emotional children that he would say that if the child didn't want it or the parents didn't want it that it would have an effect. If the child had emotional problems he probably would have no idea what he wanted and I was kind of surprised by the answer.

Q. Did you think Michael had emotional problems sir, during the year 1979?

A. Yes.

Q. Do you think he had emotional problems during the year 1978?

A. Yes.

Q. Now in the course of the three years you're saying that no one ever told you except the second grade teacher that Michael had a behavior problem?

A. That is correct.

Q. And as far as you were concerned when — was it Mrs. Reba that told you it was a discipline problem?

A. No. Mrs. Reba was first grade. Mrs. Hannon. Judith Hannon.

Q. Hannon. What grade did she —

A. Second grade.

[214] Q. And she told you that Michael was a discipline problem, is that right?

A. She did on one occasion, yes.

Q. And you asked her what the nature of the discipline problem was?

A. Yes I did.

Q. And she told you, didn't she?

A. Yes she did.

Q. And you didn't think that was a discipline problem, is that right?

A. That's correct.

Q. When you were in school were you permitted to shuffle papers at your desk at will?

MR. GALLAGHER: * * *

HEARING OFFICER: I think perhaps if * * *.

Q. Would you explain why you didn't think those problems that she eluded to were disciplinary problems?

A. Because at that point in time I felt that that would be normal for a child who wasn't learning, was struggling learning to be very easily distracted, to be more intent on shuffling papers, shuffling his feet, looking out the window than paying attention.

Q. And getting up and going to the bathroom?

A. Getting up and going to the bathroom.

Q. You thought all these things would be normal for Michael's behavior?

[215] A. I thought that would be very normal for a child that had Michael's problems.

Q. And therefore you considered that they were not disciplinary problems, is that correct?

A. That is correct.

Q. Did you look at Mr. Cavanaugh's report which has been marked as an exhibit here? P-9?

A. Yes I did.

MR. BERMAN: I don't think P-9 however is the report I want.

MR. PANICO: P-40.

MR. BERMAN: Yes, P-40 is right.

Q. I'd like to direct your attention if I may to the words test situation that appears on the first page of that exhibit. Would you turn your attention to that?

A. Um hmm.

Q. Now would you read out loud the last sentence under that please?

A. Except for the time factor, two hours with only a short break, and his concern about missing the first few minutes of his class recess, the test situation was good.

Q. Now did you ever point out to Mr. Cavanaugh that he had made that statement?

A. I never saw Mr. Cavanaugh again after the May 25th meeting.

[216] Q. Didn't you talk to Mr. Cavanaugh on the telephone sometime after the May 24th meeting?

A. No I did not.

Q. When did Mr. Cavanaugh tell you that the test situation could have been better?

A. He told us on May 25th the day he discussed it. On May 25th we were not in possession of this document. He told us the test situation was bad and he told us why and it's certainly not reflective of what's written here.

Q. Well now after you got this document — when did you get this document by the way, its marked p-40.

A. If I had a calender I could tell you. This I believe was a Friday, May 25th, and I believe we picked it up on a Monday or the Tuesday, we asked that it be ready so we could bring it to Dr. Lot so it was within a couple of days, maybe one or two workdays.

Q. O.K. after you got this document did you try to call Mr. Cavanaugh again?

A. No I did not.

Q. Did you ever attempt to try to find out what Mr. Cavanaugh meant when he said the test situation was good except for certain problems that he mentioned?

A. No I did not.

Q. Did you read the plan that was given to you by the Burlington Public Schools in its entirety?

A. I sure did.

[217] Q. How many times have you read it?

A. Maybe twenty.

Q. Now I'd like to direct your attention, if I may, to the page of the Plan that begins Learning Style Physical Constraints.

A. Um hmm.

Q. I'd like to direct your attention to the first sentence if I may, in that paragraph, the first paragraph on that page, and I'm going to read it and I'm going to ask if I've read it correctly. Michael is an eight year-five month old boy in the third grade. Did I read that correctly?

A. You sure did.

Q. Is the statement correct?

A. I don't know. At the time I wouldn't know if he was eight months, five years or eight years-five months. I'd have to go back and —

MR. BERMAN: Have to go back and check it.

Q. Well why don't you go back and check it and tell me if that was correct?

HEARING OFFICER: Counsellor, I really don't see anything conceivable * * *.

MR. BERMAN: O.K.

Q. His general mental ability has been measured as, is that high average? It doesn't show on my — High average or superior on various assessments with no significant differences noted between his verbal and non-verbal scores. Do you agree with that statement?

[218] A. I'm sorry?

Q. Do you agree with that statement sir?

A. I can't agree or disagree with it to be honest with you.

Q. No basis for agreeing or disagreeing is that right?

A. No as far as its been measured his high average, that's correct, superior he is, that's correct, on various assessments with no significant differences noted between verbal and non-verbal scores. That part I can't tell you offhand, I'd have to look it up in the test results and tell you if there was a difference. I believe it's correct that there is minimal difference between the verbal and the non-verbal.

Q. Testing indicates adequate performance in expressive and receptive language processes. Do you know what that sentence means sir?

A. No I don't.

Q. Have you ever asked anyone what it means sir?

A. No I did not.

Q. And you've read this report twenty-five times, is that right?

A. Um hmm.

Q. Now in most areas he scored above his chronological age with one exception of auditory attention span for unrelated words on which he scored 7 years, 9 months.

A. That's correct.

[219] Q. All right, Michael performed satisfactorily in a third grade classroom, however he had difficulty remembering on a day-to-day basis skills previously taught. Do you agree with that sentence?

A. No.

Q. All right. How do you disagree with that sentence?

A. With everything in it. He certainly didn't perform satisfactorily in the third grade classroom.

Q. Do you think that that statement is wrong that he performed satisfactorily in a third grade classroom?

A. Absolutely. And the rest of it's wrong also.

Q. You don't think he had difficulty remembering on a day-to-day basis skills previously taught?

A. Certain skills, yes. Certain types things he'll forget, other things he'll remember. The statement every day automatically * * * the way its read.

Q. All right. Tell me what school skills would you say that he remembers when they are previously taught?

A. Math skills.

Q. Math skills.

A. Um hmm. Gym, areas of physical education. There's various things he remembers on a day-to-day basis.

Q. Well tell me about them.

A. I can't put my finger on them. You're saying remember on a day-to-day basis. If I show him how to do something at home he remembers it.

Q. Well what do you show him how to do that he remembers?

A. Play ball.

[220] Q. Play ball. All right these are physical skills.

A. But as far as being able to remember on a day-to-day basis skills previously taught you're talking about — see it depends on the type of skills. You're talking maybe reading skills, I don't know that because I don't know what they've taught him the day before.

Q. So you don't know whether that statement is basically right or basically wrong if it applies to verbal skills, is that right sir?

A. That's correct.

Q. Now, by the way, talking about math skills, when you were at the Carroll School Michael was doing simple subtraction and simple addition, is that correct?

A. That is correct.

Q. Do you think Michael was capable of doing better than that?

A. Not much, no.

Q. Do you know what his mathematical score was on his tests?

A. I know what Burlington reflects it as and that's not the way I see it.

Q. You don't. Have you ever given him a test in math?

A. No I haven't.

Q. Did you ever find out whether or not there was a possibility or — strike that. One of your criticisms, was it not, of the Burlington Plan was that it didn't provide for Michael to take math at his own level, is that right?

[221] A. That was one of the criticisms I said based on what the school had said. You see they had contradictory statements. The school in one instance was saying that he was at grade level and in another instance on an educational plan they were putting him in a class where he was gonna be out of the classroom, out of the normal classroom in math. I said they were inconsistencies, I could not rely on the plan.

Q. Now did you speak to Mr. MacAlair about his math in the summer of 1979?

A. No I did not.

Q. Did you speak to Mrs. Aaron about his math at any time in the summer of 1979 or the spring?

A. I'd have to answer that by saying I made an attempt to sit down with the Burlington School Department on several instances to go over his educational plan and to try to, well lets say mediate his plan that I wasn't happy with and it wasn't done.

Q. Did you speak to Mrs. Aaron about his math in the summer or the spring of 1979?

A. About his math in particular, no I did not.

Q. Did you speak to Mr. Foley about his math in the spring or summer of 1979?

A. No I didn't.

Q. Did you ever ask whether it would be possible and if Michael were in MacAlair's class for Michael to take math with his peer group?

A. No I didn't ask that.

[222] Q. And you don't know as of today whether that would be possible, is that correct?

A. I'd have to say — yeah, I can answer that. I can answer that the way the class was explained to me it was not possible because Michael's problems were not academic they were emotional and he belonged in a classroom with emotional children.

Q. And its fair to say that at the time that you read Michael's plan it was your understanding that Michael would not be able to take math with his peer group, is that correct? That was your understanding.

A. I said the plan did not call for it, I didn't say whether or not I didn't feel that I could go up and make him take his — I'm certain that I could have gone up and said I wanted him

to have math with his class and I would have been entitled to have that. I had told you what the plan showed, not what my understanding of the plan was.

Q. All right. Now I want to make sure I understand. Is it your understanding sir that if you had asked that Michael be allowed to take math with his peer group he would have been allowed to take math with his peer group, is that correct?

MR. GALLAGHER: * * *. The question is based on a * * * that has never occurred.

MR. BERMAN: Shall I justify the question, I can, many times over.

[223] HEARING OFFICER: Why don't you justify it briefly.

MR. BERMAN: All right. We've listened for hours on end to hearing this man talk about the math program and hearing him talk about the plan. I want to point out how much he understands about this plan. This is a plan that he rejected because it wouldn't provide for math. Now I'll warrant there will be evidence before this hearing is over that math is one of the subjects that Michael would be taking with children who do not have learning problems or emotional problems if he were in the Pine Glen School and I want to find out if Mr. Panico knows that or not.

HEARING OFFICER: O.k. Is your question then is he aware that that was a provision of the plan or that it could be if he had indicated? * * *

MR. BERMAN: My question is did he know whether or not that would be done.

HEARING OFFICER: O.K. Why don't you ask it that way then?

Q. Do you know whether or not Michael would be taking math with his peer group?

A. Under his educational plan he would not.

Q. Did you ever ask anyone whether he would be?

A. I had an educational plan which I examined. You are asking me question on the educational plan. The educational plan calls for Michael to have math with John MacAlair.

[224] Q. Did you ever ask anyone whether or not he could be taking math with his peer group?

A. I was denied the chance.

Q. Who denied you the chance to ask that question sir?

A. Mediation. I had an educational plan which I rejected. I tried and attempted to sit down with mediation and was refused.

HEARING OFFICER: O.K. Are you saying in fact that you did not initiate a conversation with the group about the possibility of Michael taking math in the regular classroom?

MR. PANICO: In specifics of math, no I didn't. I tried to initiate regarding the plan, but not in regard to math in particular.

HEARING OFFICER: O.K. Does that answer your question?

MR. BERMAN: Yes.

Q. O.K. Now let me direct you to the next sentence in this paragraph Learning Styles Physical Constraints. Although Michael's oral reading is slow and labored he demonstrates the ability to use context clues for self-correction and is able to comprehend many ideas and detail from selected passages. Do you agree or disagree with that?

A. Partially both. Mike's oral reading is slow and labored to the point of almost being non-existent. The ability to use context clues for self-correction yeah, I think anybody can do that, you know, a car doesn't sail down a river you know, so you can do it [225] that way. To comprehend the main ideas and details from selected passages I find it extremely hard to believe unless it's one short passage.

Q. Let me ask you this. Did you ever discuss this plan with Catherine Black?

A. No I did not.

Q. Are you — did you ever ask Catherine Black whether or not Michael was able to comprehend main ideas and details from selected passages?

A. Yes. We discussed that.

Q. And what did she tell you?

A. She told me he couldn't.

Q. And did you think she was telling you the truth then?

A. Absolutely. And I clarified that by saying on minimal paragraphs and minimal — very short paragraphs he could comprehend, but if you gave him fifteen paragraphs over a period of three or four pages he'd have no idea what you were talking about. Or what he was reading.

Q. Limited sight vocabulary hinders oral fluency for appropriate level reading materials. Do you agree or disagree with that?

A. I agree with that.

Q. All right. Michael relies on word configuration rather than focusing on letters. Do you agree or disagree with that?

A. I can't agree or disagree with that. I don't know really what Michael relies on when he's trying to read. I don't think anybody does.

[226] Q. Michael's visual integration problem causes him difficulty in processing the syllable into a whole, thus his weak visual memory for whole words limits his word recognition skills. Do you agree or disagree with that?

A. I can't agree or disagree with that context with that sentence. It's nothing more than a * * *. No I just can't agree or disagree.

Q. O.K. Although Michael's short term visual memory task performance is good exposure up 10 seconds, a longer exposure time results in poor visual memory performance. Do you agree or disagree with that?

A. I don't know. As far as his memory task performance being good on a short exposure time I don't know. As far as a longer exposure time resulting in poorer visual memory performance that would be true of anybody in the world, I'd assume.

Q. He presently results in — he presently is unable to use his word attack skills spontaneously. Do you agree or disagree with that?

A. Yes.

Q. You agree with that?

A. Um hmm.

Q. Because of his distractability and limited attention for tasks completion, supervision is necessary for successful completion of prescribed tasks. Do you agree or disagree with that?

A. Yes and no again. If the work — he is distractive. But supervision being necessary is not a prerequisite to [227] completion. The — if the distractions are taken away he can complete. I don't think he has to have somebody standing over him to do it. However he has to be free from distractions that much I'll agree.

Q. Is he receiving supervision in the Carroll School for completion of his tasks, his academic tasks?

A. The same supervision that any other child in the school. He has a teacher, yes.

Q. And how many other children does that teacher have?

A. Depending on the class, five or six, four.

Q. And would you consider that a situation in which a child has supervision for completion of tasks?

A. Yes, there's supervision but I'm saying it's not what you asked me. You're saying supervision is necessary for the successful completion of the prescribed task. If you're saying somebody has to be in the room, yes I would say possibly. Is somebody standing over him, I'm saying I —

Q. So you say it depends on how you define supervision.

A. Absolutely. Degrees of supervision —

Q. And you say that the — it's adequate supervision that someone, the teacher, is in the room. The teacher doesn't have to be standing over him, is that what you're telling me?

A. No. Wait a minute. The supervision has got to be there, there's no question. O.K. He needs supervision. I'm saying he does not need somebody standing over him for eight hours a day, absolutely not. But he does need somebody standing over him making sure he's [228] doing his work.

Q. Activities fostering the development of independent work habits should be encouraged. Do you agree with that or disagree with that?

A. I agree with that for everybody.

Q. Michael enjoys reading material relating to animals. Do you agree or disagree with that?

A. I disagree.

Q. Have you ever tried * * * reading material relating to animals?

A. Yes we have.

Q. Did you ever ask Catherine Black whether or not Michael enjoyed reading materials relating to animals?

A. No. I can tell you you're miswording something. Michael enjoys animals. O.K. And he enjoys hearing about animals. Michael doesn't enjoy reading and at this point he'd enjoy reading anything.

Q. Would you be surprised to learn that it is Mrs. Black's opinion that Michael enjoyed reading materials relating to animals?

A. I think you'll find its Mrs. Black's opinion that Michael enjoys the material relating to animals. You asked me about reading. I said he didn't enjoy reading period. The materials relating to animals Michael enjoys, there's no question about it.

Q. Doesn't this say here that Michael enjoys reading material relating to animals? Isn't that what I said?

A. Well I was reading it as Michael enjoys reading material relating to animals. Not reading materials. I'm not [229] trying to spar with you. If you say —

Q. Then you say that if reading is an adjective in that case then the sentence if right. But if you say it's a gerund it's wrong, is that right?

A. O.K. I'll go along with that. Yes. I wasn't trying to — I was being very serious in that matter. Yes, things relating to animals Michael would enjoy. Being read to him or trying to read it himself on occasions.

Q. Michael's handwriting needs continued reinforcement for neatness and form. Do you agree —

A. Absolutely wrong.

Q. You don't think it needs continued reinforcement?

A. Absolutely wrong. The one thing that Michael did was write neatly. At least the papers that we've saw.

Q. All right. Michael has a positive self-image regarding his body and confidence in sports activities. Do you agree or disagree?

A. I disagree. This is something we might have mentioned that Michael at least feels he's a pretty good athlete and he was a pretty good athlete and because of that, maybe. But his image, which we found out at the time this was going on, Michael's self-image was pretty low about everything.

Q. You think his self-image about his body was low, but agree that he was a good athlete, is that right?

A. He's a super athlete but he had, even as far as athletic abilities he had a poor image of himself, he thought he stunk in everything he did, even when he was the best.

[230] Q. Michael perceives that adult and peer expectations for academic performances are beyond his reach.

A. I think that's, somebody devised that statement. I don't know where it came from.

Q. You don't think its true?

A. I don't know if its true. I'm saying I don't know. Someone devised it or whether its true or not I don't know. I don't know what he perceives of his expectations.

Q. The perceived negative attitudes concerning academic competence contributes to his questioning his self worth and causes him to become anxious, sad and angry. Do you agree or disagree?

A. No, I don't agree with that.

Q. Now lets find out what part of that you disagree with.

A. I don't agree with any of it.

Q. Well first of all you agreed that he has perceived negative attitudes concerning his academic competence is that correct?

A. I agree that anybody who is not learning is gonna perceive — is gonna have negative attitudes about his own competence —

Q. So you agree at least that he has perceived negative attitudes about his academic competence?

A. Yes.

Q. Now do you agree that those academic — that perceived negative confidence contributes to his questioning his self worth?

[231] A. I don't, I almost have to say no I don't.

Q. You don't think it does?

A. Up to the self-worth, possible. But then causing him to become anxious, sad and angry, I'd have to say no.

Q. You don't think that, your opinion, although these things contribute to his questioning his self-worth, they don't cause him to become anxious, sad or angry.

A. I just think its a bad choice of words, anxious, sad and angry.

Q. Do you disagree with the statement?

A. Yes the words anxious, sad and angry.

Q. Now let me ask you, have you ever seen Michael anxious?

A. Oh yes, I've seen him anxious many times.

Q. More so than your other children?

A. Yes.

Q. Have you ever seen Michael sad?

A. Absolutely.

Q. More so than your other children?

A. No. Oh, I'm sorry, I mean yes.

Q. What about angry? Have you ever seen him angry?

A. Um hmm.

Q. Would you say more so than your other children?

A. Yes.

Q. But its your opinion that the anxiety, the sadness and the anger that you've seen are not related to his negative attitudes concerning his academic competence or his questioning his self-worth, you don't think they're related?

[232] A. I'm saying I don't think the statement perceived negative attitudes. I don't know what Michael perceives as far as how — why he questions himself or anything. What I'm saying is he's questioning even in sports and he's a super athlete. I say concerning academic competency, I don't know, I can't answer it. I say the words anxious, sad and angry are wrong. Cause him to become that. I think Michael is that way whether at school or not right now. He's been pushed to that point.

Q. You think he's sad, angry and anxious but you don't think its just because he questions his academic competence, is that what you're saying?

A. No. I think he questions his whole worth now. Maybe if you took his academic competence out — he questions his whole worth.

Q. Doesn't this say contribute? Isn't that what it says? Isn't that the correct word there?

A. It says contribute. I don't know if it contributes.

Q. It doesn't say solely responsible, does it?

A. No. I say I don't know if it contributes.

Q. The cycle of negative attitudes and feelings causes depression and results in Michael's difficulty of focusing attention on tasks and to exert sufficient energy for task completion to meet with success. Do you agree or disagree with that?

A. Absolutely disagree.

[233] Q. Absolutely disagree. Absolutely disagree with that, is that correct?

A. Absolutely disagree, yes.

Q. Well first of all do you agree that there is a cycle of negative attitudes and feelings?

A. Yeah, there's negative attitudes and feelings, absolutely.

Q. All right. Do you agree that there is depression?

A. Yeah, there's some depression, yes.

Q. Do you think the cycle of negative attitudes and feelings have something to do with the depression?

A. Absolutely. Up to that point I agree with the statement.

Q. All right. So you don't disagree absolutely, do you?

A. Yes, of course I do. I disagree with the statement. I'm not saying —

Q. Do you know what the word absolutely means sir?

A. Yes, it means —

HEARING OFFICER: Why don't you let him finish what he was saying.

A. I disagree with the statement absolutely. The statement is stating that the cycle of negative attitudes and feelings cause depression and results in Mike's difficulty to focus, etc. is a statement. Up until that point if you want to take those words out and we can play with semantics the cycle of negative attitudes and feelings cause depression absolutely. They would in anyone. But then to result in Michael's difficulty to focus attention on tasks and to exert sufficient energy for task completion to meet with success, no. No, I [234] don't think they have any effect on him —

Q. You don't think they have any effect — no effect at all, right?

A. No. Michael has a learning disability that's why he can't focus his attention on a task. * * * depressed —

Q. All right. And you say sir that if we — that it's the learning disability results in Michael's difficulty to focus attention on tasks and to exert sufficient energy, that would be true, is that right?

A. I'd believe that, yes.

Q. But when it says cycle of negative attitudes and feelings cause it, that you don't agree with, that's right?

A. I don't agree with that at all.

Q. All right. Lets go on to the next page. Michael uses defense mechanisms distantiation, regression and denial to avoid dealing with the perceived conflicts. Do you agree or disagree?

A. I find it —

MR. GALLAGHER: I would like to object to this kind of line of questions. The word distantiation is a kind of some sort of a jargon to * * * and should not be an addition.

MR. BERMAN: I — all I'm asking Mr. Panico is whether he agrees, disagrees or has no opinion as he has told me he has no opinion.

MR. GALLAGHER: I would like you to use language that is commonly used in North America and the word distantiation is not commonly used in North America.

[235] MR. BERMAN: Mr. Gallagher —

HEARING OFFICER: Hold on. Let me intervene here for a moment. Distantiation is a psychological term. If you want to define it so that Mr. Panico knows what it means —

MR. BERMAN: I don't —

HEARING OFFICER: Or —

MR. BERMAN: Madam Hearing Officer I just want to find out at this point what he agrees with and doesn't agree with in these paragraphs. And if he doesn't understand the paragraph that he's read twenty-five times he can tell me that too.

HEARING OFFICER: All right. I'll allow it and I would add that if you had only said that * * *

MR. BERMAN: If you don't understand it, say so.

A. I don't agree with the sentence.

Q. You don't agree with it?

A. Not at all.

Q. Do you know what distantiation is by the way?

A. It was explained to me.

Q. By whom?

A. By Mr. Gallagher.

Q. And what did Mr. Gallagher tell you it means?

MR. BERMAN: Strike the question.

Q. What do you understand it to mean?

[236] A. O.K. I would have to give you — I wrote down in my little notes he explained it to me at the time. Its subject to the effect of they give you an example say you say some, I think the example they used was, there was a girl in a cabin, an old run down cabin, and she was there with old rags hanging on her and everything else and Michael wouldn't admit that the scene was a sad one but rather picked out minute details in the thing that the girl was dressed in such and such clothes, the cabin was brown, etc. Not focusing him on the subject matter but trying to withdraw into * * * facets of it.

Q. And its your opinion that Michael doesn't distantiate, is that the correct word?

A. I said I don't agree with it, yes.

Q. All right, you say he doesn't distantiate, is that correct?

HEARING OFFICER: I think if you * * * the sentence a little more.

Q. All right. Do you agree that he does? You say he doesn't.

A. I said I don't agree with the sentence.

Q. I'm asking you does Michael engage in distantiation? That he used distantiation as a defense mechanism.

A. If that's the correct definition of it — I don't know the correct definition of distantiation. That's the way it was explained to me. I asked a psychologist [237] who had no idea what it was which was Dr. Isenthal. He didn't know what it meant.

Q. Now I'm asking you that based on your understand of the term do you think he engages in distantiation?

A. No.

Q. All right. Do you think he engages in repression?

A. Alone as itself, everybody engages in repression. You repress what you want to repress. You don't go around thinking about your mother getting hit by a car every day of the week, you repress. Does he do it? Of course he does. Does he do it in the context of this sentence? No.

Q. Thus he becomes more demanding and critical of himself and questions his self-worth. Do you agree with that?

A. Not in the context in which it's used in that paragraph.

Q. Do you think he becomes more critical of himself when he has problems?

A. When he has a problem?

MR. BERMAN: Yes.

A. I don't think so. No more than anybody else.

Q. Do you think he becomes more critical of himself when he has a problem sir?

A. What type of a problem?

Q. A problem with learning.

A. More critical of himself, no.

Q. You don't think so.

A. No.

Q. He doesn't become any more critical of himself?

A. No.

[238] Q. And you don't think he questions his self-worth, is that correct?

A. He questions his self-worth quite often.

Q. And do you think becoming critical of oneself and questioning one's self-worth might be related concepts sir?

MR. GALLAGHER: Is that the last, I think he's answered to a * * * conclusion that that's a statement of fact * * *.

MR. BERMAN: Fair enough.

Q. Michael is presently being medicated for migrane headaches under the care and treatment of Dr. Lot at MGH. Is that true in this report sir?

A. Yes it is.

Q. I believe you testified that in your opinion Michael did not have a vocabulary of two hundred words, a reading vocabulary of two hundred words.

A. * * *

Q. Did you say that that was one of the things wrong with the plan. The plan said he had a reading vocabulary of two hundred words and that was a * * *.

A. I don't think that's quite what it says. It says Michael has a sight vocabulary of two hundred words. Michael has a very extensive vocabulary. Sight vocabulary of two hundred words is not correct.

Q. All right. Did you ask anyone where the information came from that Michael has a sight vocabulary of two hundred words?

[238A] A. I never had the opportunity to ask anyone.

Q. Did you try to call anyone to ask about that?

A. No I did not.

Q. Did you ever show Dr. Lot the statement that Michael has a sight vocabulary of two hundred words?

A. No I did not.

Q. Did you ever ask Dr. Levine for his comments on that?

A. No I didn't.

Q. Did you ever ask Miss Mason whether any of their ideas or any of the tests they performed, that she performed are reflected in the educational plan for Michael?

A. * * *

Q. Did you ever ask Miss Mason whether or not any of her testing or her statements about testing were incorporated into the educational plan for Michael?

A. No I did not.

Q. Did you ever ask Miss Mead whether any of her testing diagnosis or ideas were incorporated into the educational plan for Michael?

A. No they weren't available when this statement was presented to me.

Q. Did you ever ask them sir?

A. I said no they were not available when the plan was presented to us.

Q. All right. Did you ever try to reach any of them by telephone?

A. No I did not.

[239] Q. Is it your understanding sir, that if a person wasn't present at the June 4th core meeting that person could not have contributed to this plan, is that your understanding sir?

A. I'd have to answer that with more than a yes or a no. My understanding is we are being presented with a plan for my child which was supposed to be developed on that date. If the people who supposedly offered input aren't there to answer my questions or at least offer input as to how the plan is presented, there was no way the input, in my mind, would be valid. I had a psychologist and I had two testers who supposedly, the indications are given to me, had input or should have had input or possibly could have but they were not available for me to even ask a question of them as to how their input or what they derived their input on. So I can say I didn't. No I did not call them in July and say did you have input. I didn't even know their numbers. At this point in time I was given a plan to accept or reject.

Q. Did you call them in June?

A. I did not have a plan in June.

Q. Did you ever find out in June whether or not they had contributed to this plan?

A. I didn't have a plan.

Q. You were able to find out Mr. MacAlair's number, weren't you?

A. Yes I was.

[240] Q. Did you try to find out Miss Mason's?

A. No I didn't.

Q. Did you try to find out Miss Mead's?

A. No I didn't.

Q. Now did you ever tell Mr. Foley that Mrs. Aaron had told you that Mr. Barrows ruined the Memorial School?

A. Good question. When I met with Mr. Foley the first time in his office in the summer I believe August of Mike's second grade, I don't believe I ever told him directly that Barrows ruined anybody. But I think expressed concern over Dick Barrows, the fact that he denied me a core, some of the statements that he had made to me and the events that had happened in the past. Whether I told Mr. Foley I know Mr. Foley was present when I went before the School Committee when I made the statement. I don't think at that time that I made the statement that Dick Barrows ruined children though I might have.

Q. Did you say that Mrs. Aarons had said it?

A. I don't recall. I very well

Q. All right. The question was this. Did you ever tell Mr. Foley that Mrs. Aaron had said to you that Mr. Barrows had ruined the Memorial School?

A. I don't think I ever said he ruins the Memorial School but he ruined some children in the Memorial School. And whether or not I said it to Mr. Foley I answered I don't recall. I very well might have, I'm not certain.

[241] Q. Well what did Mrs. Aaron say to you about ruining the school?

A. She didn't say ruined the school she said — I'd like to refer to the notes I made that day.

Q. Is that because you're unable to recall sir, is that your notes?

A. No I think its just a very. I can recall very well but I think its a very pointed question — I don't want to make a mistake. I'd like to be very certain as to the exact terminology and I think I wrote it down.

Q. All right. Why don't you quote that.

A. Mrs. Aaron told me that she was gonna tell me something and if we were ever adversaries across a table that she will lie, she said I'll lie. And Dick Cavanaugh told her he said he would swear to it. My wife and I were both present and she told me Michael had, and I put it in quotes, "Memorial School Syndrome, Barrows ruins kids like Mike. They can't fire him because he's tenured." We then went on to have a long discussion about Mr. Barrows to the point where she said — I don't think I have it down here but I do recall it as plain as day, Mr. Cavanaugh was present, that the only way they could fire him would be if he committed a sex crime because he was tenured. That he ruins it, everybody is aware of it, he's no good to work with, the teachers don't like him, they've got a lot of problems with parents, and she went on and on at great length about Mr. Barrows in the Burlington School — Memorial School.

[242] Q. Was that your understanding sir, that Mr. Barrows could only be fired if he committed a sex crime?

A. I have no idea whatever. I —

Q. You have no understanding of that, is that correct?

A. I don't know. I don't know what tenure — what it does protect and what it doesn't protect.

Q. Do you have tenure in your job sir?

A. No I don't.

Q. Do you have any protection against being arbitrarily dismissed?

A. Well I have some sort, sure. Civil Service.

Q. You have Civil Service Protection don't you sir?

A. Yes, yes I do.

Q. And is it your understanding about your job that you could only be dismissed if you committed a sex crime?

A. Absolutely not.

Q. Now I believe you testified that in February of 1979 Michael was a patient in a hospital?

A. That's right.

Q. For how long?

A. * * * time in the hospital?

MR. BERMAN: That's right.

A. I think he was admitted 2/8 and discharged 2/11, four days.

Q. And that was at the Lawrence Memorial?

A. That's correct.

Q. And he also was down at the MGH for —

A. He was at the MGH the day before when they rushed him [243] from Dr. Levine's office.

Q. And did you notice any difference in Michael's behavior before and after the hospitalization?

A. No.

Q. Did you notice any difference at all in his attitudes before and after the hospitalization?

A. None whatever. Other than he was tired for a while after the hospitalization.

Q. Other than that you say the hospitalization had no emotional effect on him, is that correct?

A. Um hmm.

Q. When did you first hear of the Carroll School?

A. May 18th.

Q. And who told you about it?

A. It was I — this is where I think I testified earlier — I don't recall if it came up at the meeting where we were all present, or if it was said either by Miss Mead or Miss Mason after the meeting. That was the first time I heard of it, that day. It was then also reiterated because we discussed subsequent to the meeting, this I recall emphatically, outside in the hall with Catherine Black.

Q. The first time that the Carroll School was ever mentioned to you it was mentioned by either Miss Mead or Miss Mason, is that true?

A. No, I don't recall. I discussed it and we mentioned it with one of them, either during or after the meeting. I felt it was after. I don't know if it was raised at the [244] meeting. Someone made a remark that we should look into a school specializing in learning disabilities. Two names were mentioned, the Carrol and the Landmark Schools. Until that day I had never heard of either school and never even knew they existed.

Q. Did you make that remark?

A. I just told you I never heard of the Carrol School or the Landmark prior to that day.

Q. Did your wife make that remark?

A. She had never heard it.

Q. Did Mrs. Aaron make that remark?

A. I don't recall. I don't know if it was her, it was someone — I know I discussed it with Catherine Black. I also —

Q. Do you think Mrs. Black may have raised that question — made the remark?

A. At the meeting?

MR. BERMAN: Yes.

A. She could have. I said it was discussed afterwards with Miss Black. It could have been raised by her right at the meeting, yes it could have.

Q. All right. You think that at that meeting Mrs. Black raised the question of sending Michael or she might have raised the question of sending Michael to the Carroll School or the Landmark School, is that right?

A. I don't think so. I said it possibly could have been Mrs. — I'm almost —

Q. Possible.

[245] A. I'd have to say no. I'd have to say with certainty it was not her at the meeting.

Q. All right. When is she — Now I'm trying to find out who is — this is the May 18th meeting. You were present?

A. Let me tell you who was present.

Q. Go on tell me who was present please.

A. On the May 18th meeting there was Mead, Mason, Black, Aaron, Fornier, myself and my wife and I'm not certain although I'd have to state with almost certainty that Sally Hennessey was there. We did have a sign in sheet. But they were there.

Q. All right. Does it seem to you that at that meeting —

A. Oh, wait a minute now. Let me back it off — hold on. I'm trying to get my thing in perspective here. Yes they were there at that meeting, absolutely.

Q. Now can you remember whether or not the person who raised the Carroll School or the Landmark School for the first time in your hearing was Mr. Hennessey, or Miss Hennessey?

A. No I can't.

Q. Do you think she might have been the one who did it?

A. I don't recall if it was even said right at the meeting. I'm still —

Q. O.K. You're not even sure —

HEARING OFFICER: Please let me break in for a moment. I think I've heard Mr. Panico testify that he believes that he had not heard of the Carroll [246] School until that day.

MR. GALLAGHER: That's right.

HEARING OFFICER: Is it a specific relevance that you are leading up to?

MR. BERMAN: Yeah, I want to find out who said it, yes.

HEARING OFFICER: Do you think you can clarify the purpose?

MR. BERMAN: Well, I'd rather not at this moment —

HEARING OFFICER: Well its just that its taking a long time to get * * * of all of this and you know if not really important I would just as soon drop it. If you think its important I can let you go on.

Q. O.K. Would it be fair to say that you can't remember whether the Carroll School was mentioned at the meeting or not?

A. I can't, no I can not.

Q. You can't remember whether it was mentioned —

A. When I say meeting, the formal meeting prior to us, you know, getting up and few people talking. When we were actually sitting down at the meeting discussing my son I can't remember if it was mentioned then or if it was remembered immediately thereafter.

Q. It was mentioned somewhere out in the hall, your sure of that?

A. No, no. It was mentioned a second time because then I [247] talked to Catherine Black, my wife and I talked to Catherine Black, asked her about the Landmark and Carroll Schools, asked her which one was better, and she told us if we were gonna look, look at both of them and she also at that point reiterated the fact or told us that Michael's program had been cut down from an hour to a half an hour, that Michael wasn't getting the education, that they were making Michael sit in the classroom and boy if we didn't get him into a school quickly we were gonna destroy him. That was her — that was what transpired in the hall. What happened in the meeting, who made the mention of Carroll or Landmark, I do not recall. If it was in the meeting or in the classroom after the meeting.

Q. By the way, did you — were you here when Mrs. Black testified on September 10th?

A. Um hmm.

Q. Did you hear her testify that if Michael hadn't been sent to the Carroll School he would have been destroyed?

A. Oh I don't know if she used any words like that.

Q. I don't think she used any words like that at all, did she sir?

A. No, I don't think she said that in her testimony at all.

Q. And in fact she was asked her opinion of John MacAlair's class, wasn't she?

A. I'm sorry, she was —

Q. She was asked for her opinion of John MacAlair's class, wasn't she?

A. Yes she was.

[248] Q. She had a good opinion of it, didn't she?

A. For certain people, but not for Michael, I remember that part of the testimony.

Q. That's your remembrance, is that correct?

A. Yeah. I think if you play back the tape you'll find it.

Q. Well now let me get back to that last question. If you didn't hear about the Carroll School at the meeting of May 18th or the Landmark School, then it would be fair to say the first time you heard about it was out in the hallway after the meeting, is that right?

A. I explained it. It either came —

Q. You haven't —

A. At the meeting or following the —

Q. It happened at the meeting?

A. I said it either — don't put words in my mouth — either, at the meeting, when we were sitting down, or when we broke and I spoke to Miss Mead and Miss Mason. We spoke to them together and alone. In other words when I say alone I don't mean that we went in a corner, I mean we were talking to them one at a time and we were talking to both at one time. Some-

where in that context of the meeting or these discussions afterwards and I said I believed it was either Miss Mead or Miss Mason, I couldn't recall who. It very well might have been Sally Hennessey, I don't recall who. But prior to discussing it with Catherine Black it was mentioned.

[249] Q. What I'm asking you sir is this, did the discussion after the meeting take place in the hall?

A. No. The discussion, the original discussion after the meeting took place right in the classroom.

Q. It took place in the classroom.

A. Yes.

Q. Now would it be fair to say that you either heard about the Carroll School for the first time in the discussions after the meeting or at the meeting itself?

A. Yes, absolutely.

Q. And you can't tell me which, is that right?

A. Exactly, no I can't.

MR. BERMAN: No further questions.

HEARING OFFICER: Thank you. You don't have any further questions at all.

MR. BERMAN: No.

HEARING OFFICER: O.K. Now I'm going to allow you re-direct and then I'm gonna have a couple of questions myself.

RE-DIRECT BY MR. GALLAGHER:

Q. Regarding the conversations with various people on the — regarding this education plan that was presented to you.

A. Um hmm.

Q. P-41. Don't even look at it. Had you been invited to give any comments on that plan to anyone?

A. No.

Q. Have you made attempts to contact and deal with the Superintendent of Schools here?

[250] A. Yes I did.

Q. Did you through your lawyer, make an appointment to meet with him at sometime back in August of this year?

A. Yes I did.

Q. Did he attend that meeting?

A. No he did not.

Q. Do you know where Miss Mead lives?

HEARING OFFICER: * * * based on * * * point was there a meeting?

MR. GALLAGHER: There was a meeting.

HEARING OFFICER: With a representative of the School Committee?

MR. GALLAGHER: There were two representatives from the School System.

Q. Do you know where Miss Mead lives?

A. No idea.

Q. Do you know where Miss Mason lives?

A. No.

Q. When did you receive the education plan, you've already testified to this.

A. It was in the end of June, June 27th or 8th.

Q. Do you know when School is out for the year?

A. I believe at least a week or so before that. Maybe two weeks.

Q. When did you have to make your commitment to the Carroll School?

A. I believe it was August 1st.

Q. After you received the education plan, did you make any communications before August 1st, did you make any [251] communications with the Burlington School Department?

A. After receiving it and before August 1st, yes. After receiving the educational plan?

MR. GALLAGHER: Um hmm.

A. I think I might have said yes too quickly. The date, I'm sorry, yes I did. I talked to Mr. Michael because of the fact I wanted something done quickly so that we could get the thing straightened out because of the financial obligation of putting Michael in the Carroll School. I wanted to try to resolve the issue prior to that.

HEARING OFFICER: To whom did you talk?

A. Mr. Michael the Superintendent of Schools. He was busy and then he was gonna be on vacation, etc. It was right around the 1st of August. It could have been a day or two before, it could have been a day or two after. Somewhere in either late July or early August I tried to set up an appointment with him on three separate occasions.

Q. And effectively you were unable to communicate with Mr. Michael before August 1st?

A. Correct.

Q. And therefore you were obliged to make your commitment your financial commitment to the Carroll School?

A. Mr. Michael, I did communicate with him, but he wouldn't sit down with me. Mr. Michael told me to — it was my choice, if I wanted to pay the Carroll School that was my choice, pay it.

[252] Q. Did he offer to make arrangements for you to sit down with a Miss Mason?

A. No he didn't.

Q. Or Miss Mead?

A. No he didn't.

Q. You had spoken with — when was your first communication, the first conversation with Mr. MacAlair?

A. The first conversation was on June 4th at the core meeting.

Q. At that time did Mr. MacAlair tell you anything about his class?

A. He did. Very, very little. All he — more or less we talked about was we met, introduced ourselves. I think an appointment was set up and I was gonna go up and sit in on his class, bring Michael up there to meet him also and I was gonna sit in and observe his class. Also he explained a little bit about his class, what he tries to do, build up the kids egos, the reward system, he tries to take the pressure off them, etc. I asked him specifically, I asked — I shouldn't say I asked him, I asked specifically, I might have asked Jean Aaron relative to his learning — relative to what they could do for a learning disability and it was, you know, that he provided reading, he provided a reading program.

Q. When you had — was some question brought up in cross examination about Michael's supposedly being a discipline problem.

A. That is correct.

[253] Q. And a discussion that you had with Mrs. Hannon?

A. Um hmm.

Q. Did you * * * — in your discussion with Mrs. Hannon she said that Michael widgets and fidgets a lot and shuffles his feet. Did you inquire specifically as to whether he, Michael, got fresh with her or talked back to her in class?

A. I did.

Q. And what was her answer to that?

A. Her answer was no.

Q. Inviting your attention to Mr. Cavanaugh's report at P-40, on page two of the second paragraph of that, does Mr. Cavanaugh spell out that the scores may have been somewhat depressed by emotional factors?

A. Your talking not in this place where he spells test situations and says the test situation was good? Are taling [*sic*] page 2, first paragraph. Oh, I'm sorry. It is my impression that Michael's performance should have resulted in scores rather uniformly in a high average range if other factors had not interfered.

Q. Now you've been cross-examined extensively on a paragraph or three pages upon P-41, am I correct?

A. That's correct.

Q. Now I would like to ask you whether you know or surmise that's the question, its know or surmise, who wrote those, those paragraphs.

MR. BERMAN: I object to the form of the question. I'll take it as know or — I'll take the [254] question as know or if he doesn't know then whether —

MR. GALLAGHER: Then he could say I didn't neither know or neither surmise.

MR. BERMAN: No, I object to the point of the question.

MR. GALLAGHER: All right.

Q. Do you know who wrote them?

A. No I do not.

Q. Did you surmise who wrote them?

A. Yes I did.

MR. BERMAN: Object. These surmises are totally immaterial.

MR. GALLAGHER: I'm trying to — I'm delighted he said that because that's what I'm trying to point out. To surmise as to who wrote it.

HEARING OFFICER: O.k. what Counsellor is saying is that you know, you guess * * *. I would ask you if you have any indication from the report who did write * * *.

A. Jean Aaron.

HEARING OFFICER: On what basis?

A. She told me she was gonna write the educational plan the 27th. She told me she would write the educational plan for Michael. She did not have it as of the 27th — on the 28th she had it. I would have to assume she wrote it. It's not signed by anybody else. It's signed by her.

HEARING OFFICER: On the basis of reports [255] of other people or —

A. I'm sorry —

HEARING OFFICER: I assume that's on the basis of reports of other peop'e or do assume —

A. Oh no, I assume she took that out of reports of other people.

Q. But that is an assumption on your part?

A. Yes it is.

Q. So you know very little about the authorship of that and whether it is in large measure borrowed from other sources?

A. That's right.

Q. And no one has ever — well all right its not signed — Now you were questioned as to your knowledge of people being dismissed from Civil Service positions or tenured positions.

A. Yes I was.

Q. Did you at any time say that a person could only be dismissed for sex offenses?

A. From a Civil Service job?

MR. GALLAGHER: Yes, or

A. I didn't say that that's the only reason he could be dismissed I said he would have to do something like commit a sex crime.

Q. No, but were you quoting this thing from somebody else or was that your opinion?

A. No, I was quoting from somebody else.

[256] Q. Have you ever taken the stand or position that person could only be dismissed from a tenured position because of a sex offense?

A. No I have not.

Q. But that is a quotation from someone else?

A. I — even in that way I don't know if I said he could only — he would have to do something like commit a sex crime. I don't know if I said he could only —

Q. Did you say that or did someone say that to you?

A. That was said to me.

Q. All right. No further questions.

HEARING OFFICER: All right. I'm gonna go back to some of the contact you had with the staff at Mass. General and ask you if you recall which reports of the Burlington Public Schools were shared with the staff there. Did they have, did Dr. Lot, Dr. Schoenfeld and the other person who was involved have access to the full reports not just to the psychological report in May.

A. O.K. In May when we saw Dr. Lot we gave him I think we say him maybe the end of May or the beginning of June, we gave him the psychological report. Whether or not they got the additional records, I'm pretty sure they have, they did get them, but all at that point in time they had to my knowledge when we first met with Dr. Lot, we gave him the psychological test and they had previous Burlington School tests. Whether or not they got, I believe they did get them but I couldn't possible say for certain. I think that would be available in the School records. But I'm pretty sure that they were [257] sent to Dr. Lot.

HEARING OFFICER: Let me ask a point of information. Does the School have a record of transmission of tests to Mass. General?

MR. BERMAN: May 31, 1979, Dr. Lot, MGH, Re: Michael Panico, Dear Dr. Lot:

In order to insure that you have the total package of information regarding Michael Panico I am enclosing our most recent assessment that will be presented at the June 4, 1979 meeting for Michael. I look forward to being able to discuss with you any additional testing.

Thank you for your cooperation in developing appropriate educational planning for Michael according to his specific needs. Sincerely, Jean Aaron.

HEARING OFFICER: O.k. so was sent to Dr. Lot.

MR. BERMAN: On May 31st.

HEARING OFFICER: On May 31st. O.k. Were those discussed at all with Dr. Schoenfeld or who did the testing?

A. Sherman Isenthal, the psychologist. Dina Schoenfeld, exactly what she had I'm not sure about. All I was told is she obtained the records. Dr. Lot told us he sent her everything he had and she said she had looked at Michael's test results and evidently she probably did have those because she had mentioned certain tests where his grade level had gone down in some reading tests, etc. I have to assume that yes, they got everything.

[258] HEARING OFFICER: You had noted that in the discussion that in May when Mr. MacAlair * * * there was some discussion regarding an appointment to appear in his class. Was that appointment * * * with or without Michael. Did he visit the class in June or is there some reason why he didn't?

MR. PANICO: Michael, no. There was no reason. In — On May 25th at the meeting we had with Jean Aaron and Dick Cavanaugh it was suggested at that point in time that we go visit John MacAlair's class and take Michael so Michael could meet the teacher he would have the following years. When we went to Dr. Lot which I believe was the following Monday or Tuesday, that meeting was on Friday I believe, May 25th. The following Monday or Tuesday Dr. Lot told us not to take Michael to that class, he had enough problems. Right now when he didn't know what the hell was going on he wasn't gonna be, you know, don't confuse him any more. We had told him that we had set up an appointment at the Carroll School and we were taking him he said fine. Don't take him, don't confuse him any more than he's confused right now. And he thought it was, you know, not to take him. I think when I talked to John MacAlair I told him that and that was pretty much the reason we didn't go to the classroom.

HEARING OFFICER: So at the advice of Dr. Lot you didn't take Michael when —

[259] MR. PANICO: That is correct.

HEARING OFFICER: And you didn't see it either.

MR. PANICO: I didn't go because that's when Dr. Lot had sent us down to Sherman Isenthal and had sent the records and I was waiting to find out — at this point in time we were still told this was a class for emotional children and we weren't 100% certain Michael wasn't a primary emotional problem. Dr. Lot hadn't finished the test.

HEARING OFFICER: O.k. Within one of the reasons that you've given for rejection of the educational plan you had questioned the effect of the * * * and said that, if I have * * * correct, you said that Michael couldn't read at all and I wonder if you had said that, you know, could not read at all or * * *.

MR. PANICO: If you gave Michael a sentence like The dog went down the street, it might take him three minutes to read it and he probably wouldn't have it right. That to me is for all intents and purposes, illiterate. Now he's improving and he has improved immensely in the last month or so on simple sentences but going into the point of these tests Michael if he was given help could read. I think maybe I should bring this point up and as far as the test results, Catherine Black's tests are in here and the — her remarks of the June 4th core meeting which [260] aren't in there, Catherine had stated at that meeting that her test results were severely inflated because the time was taken completely off with Michael and she gave him all kinds of help and let him break words up into syllables and long and short vowel sounds and she helped him — she was trying to test to see what he knew not what he could do. Michael can't read. Michael can't read exit and Michael can't the simple words. Sometimes he can read a few words, yes. Sometimes he can even read a sentence too but most of the time he can't. When I said Michael can't read I say that to say that Michael reads at the third grade level or to say Michael has 200 sight words is absurd. No way he could have 200 sight words.

HEARING OFFICER: Then you disagree with those that * * * sight vocabulary and skills at oral reading or —

MR. PANICO: Primarily his sight vocabulary. His skill at oral reading the measurement I'm not certain of. What's a second grade, second month level at a 10 percentile as compared to you know, second grade, second level, 95 percentile I'd have to see, you know, you have to know how to measure that.

HEARING OFFICER: Do you believe that that * * * recorded by the MGH?

MR. PANICO: Michael read better a year and a half ago — Michael read better when he was tested in the second grade. in my opinion, Michael was a [261] better reader in the second grade. Early in the second grade than he is now.

HEARING OFFICER: So you think there has been some regression in the reading ability?

MR. PANICO: Yes I do.

HEARING OFFICER: In the last year?

MR. PANICO: Within the — just the last year.

HEARING OFFICER: Now is that based on your observation or is that * * *.

MR. PANICO: No, only on my observation. At the end of the second grade Michael was starting to read. At the end of the third grade Michael wouldn't even attempt it.

HEARING OFFICER: Do you believe that the difficulty that you were talking about in relation to his self worth were related to that reading problem or could the reading problem be related to his self image or the reverse?

MR. PANICO: I * * * is that he does now have emotional problems and there is no question in my mind that they're a result of certain consequence of his not being able to learn.

HEARING OFFICER: I'd just like to go back for a moment to * * * in my own mind, you had testified as to a history of contact with the school and discussions of what you thought

were the problems that Michael was having very early and at some point [262] you indicated that the school teacher had given you some information about evaluations and * * * had that information had been given to you * * * or are you saying that you never were given information about * * *

MR. PANICO: What we received when we first signed for the first quarter back in June it contains one, two, three, four, five pages. The third page is evaluation process rights of parents, and it's one page long. When we went through the school records there was quite a bit beyond that one page but we never received it. We only received a point up to saying we were getting a full core. As to whether or not it was given me orally I became aware of it myself and I know we discussed it at different times and I was knowledgeable enough about it. But when we received the last Ed Plan again, when we received the educational plan in March of the second grade we received nothing about the rights and we received the plan this past year in June 28th we received nothing but the educational plan and it does state on the last page that you have a certain right to accept it or reject it. But as to the actual rights you have and additional testing and all that we never received anything.

HEARING OFFICER: O.K. So all the * * * you say you never received in writing. Verbally you may have been given some information as to —

[263] MR. PANICO: Verbally only when I requested it. Right, only when I asked for it.

HEARING OFFICER: And you testified that there was no educational plan that resulted from the June 1977 meeting?

MR. PANICO: No educational plan whatever.

HEARING OFFICER: Was there a statement that had special * * *?

MR. PANICO: Nothing at all.

HEARING OFFICER: When Michael was put on medication from your perception was there any difference in performance as far as * * * to school or his headaches?

MR. PANICO: His headaches eased some what at the beginning. As far as his performance in school it was pretty caustic. It didn't appear to me, at least to me, it didn't appear to affect Michael at all the medication other than maybe relieving the headaches to some degree. None of the different medications ever affected him as far as anything emotional, bahvioral, you know, sleepiness or anything like that.

HEARING OFFICER: Was he able to accomplish any more in school on that medication?

MR. PANICO: No.

HEARING OFFICER: So let's go back to the I.Q. for a moment. The * * * that was written by the March 17, 1978 was the special educational folder.

[264] MR. PANICO: Unless, excuse me, unless the — we construe the letter we received which said its an educational plan but there was no testing, there was core, there was no anything. It says enclosed please a copy of the educational plan which we have developed for your child. Which was the first grade, its exhibit P-2.

HEARING OFFICER: O.K. What was the date on that, do you know?

MR. PANICO: The date on that there, it was attached to a document dated May 31, 1977 it was a cover sheet and it makes mention of counselling, etc. But where it — why an educational plan or what I had no idea at that point in time.

HEARING OFFICER: O.K. One question about the notes that you have as far as the * * * and then could you compile them * * *

MR. PANICO: They have been compiled, the two notes that I refer to the one with the conversation with Dick Barrows which is P-3 was written within a half an hour after the time I

left his office. The other one which related to the conversations of May 25, 1979 between myself, my wife, Jean Aaron and Dick Cavanaugh were made during the course of the meeting where we were sitting and that's why they're sketchy. I did write a memorandum of contact down.

HEARING OFFICER: And the other notes in addition you're talking about, the additional information [265] that you compiled.

MR. PANICO: The documents I think I might have lost.

HEARING OFFICER: Of conversations and phone calls and things like that.

MR. PANICO: No I had kept a chronology as we were going along, most phone calls, those things and little notes as to what transpired.

HEARING OFFICER: Including the meetings of the teachers and things like that * * *.

MR. PANICO: No the meetings of the teachers I didn't keep. I didn't have — those were just as we were putting the thing together recollecting what had happened. There were other meetings which I just didn't recall — these are only the ones that stuck in my mind.

HEARING OFFICER: So the ones that you actually made relative to the * * * to the conversations you had within the meeting with —

MR. PANICO: With Barrows and with Cavanaugh and Aaron. Excuse me, and the notes of the date of the Pine Glen and the Carroll School. Those were made that day.

HEARING OFFICER: O.k. For some reason I have a note in here about whether W. French had tested his LD areas. About his June 4th team meeting in preparation I guess for the plan that or the MGH report?

[266] MR. PANICO: No one — there was no retesting by the MGH.

HEARING OFFICER: Other than the psychological evaluation.

MR. PANICO: That was not available at the June 4th meeting.

HEARING OFFICER: O.K. I think that's about all the questions that I have. Does anyone have any additional questions?

MR. BERMAN: No.

. . . . . .

[The following was filed in the District Court on February 26, 1980.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil No. 80-359-Z

TOWN OF BURLINGTON and
the SCHOOL COMMITTEE
FOR THE TOWN OF
BURLINGTON,
Plaintiffs,

v.

THE DEPARTMENT OF
EDUCATION OF THE COMMON-
WEALTH OF MASSACHUSETTS
and JOHN DOE, as he is father
and next friend of
JOHN DOE, JR.,
Defendants

COMPLAINT

COUNT ONE

1. Plaintiff, Town of Burlington, is a municipal corporation duly organized under the laws of the Commonwealth of Massachusetts and having its principle place of business at Town Hall, Burlington, Massachusetts.

2. Plaintiff, School Committee of the Town of Burlington, is the duly elected School Committee of said Town of Burlington and has its principal place of business on Center Street in said Town.

3. The Department of Education of the Commonwealth of Massachusetts is a department of state government with its principal place of business in Boston.

4. Defendant, John Doe, is the father and next friend of John Doe, Jr., a minor, and lives in the Town of Burlington.

5. In August of 1979, Defendant John Doe, on behalf of John Doe, Jr., petitioned Defendant Department of Education to hold a hearing on whether his son John, Jr., allegedly a child with learning disabilities, was entitled to be enrolled at the expense of Plaintiff in a private school for children of learning disabilities rather than in a public school of the Town of Burlington

6. The Department, by a hearing officer, conducted hearings on September 26, October 30 and 31 and November 1, 1979 on the application of Defendant Doe.

7. On January 31, 1980, the hearing officer employed by the defendant Department rendered a decision, a copy of which is annexed to this Complaint and made part hereof, by which decision Plaintiffs are aggrieved.

8. The decision of the Department dated January 31, 1980, which decision appears Plaintiffs rest primarily upon the finding and a teacher appointed by Plaintiffs, John McAller, lack the capacity to implement the general objectives of a plan of education devised by Plaintiffs for John Doe, Jr., is erroneous. Plaintiffs and Mr. McAller have the capacity to implement the objectives of the program.

9. Other findings adverse to Plaintiffs made by the Department hearing officer are erroneous in fact or irrelevant to the proceedings.

10. Jurisdiction of this count is based upon the provision of title 20 U.S. § 1415 (e)(2).

WHEREFORE, Plaintiffs pray as follows:

1. That this Court stay the enforcement of the decision of Defendant Department until after hearing of the merits;

2. That this Court, after hearing evidence, enter judgment annulling the decision of the Department dated January 30, 1980;

3. That this Court grant Plaintiffs any other relief appropriate in the circumstances.

COUNT TWO

1. Plaintiffs incorporate by reference the allegations of Paragraphs one through eight.

2. The decision of Defendant, Department of Education dated January 31, 1980 is:

a. In violation of the Constitution of the United States and the Commonwealth of Massachusetts.

b. In excess of Defendants Departments statutory authority or jurisdiction

c. Based upon error of law.

d. Made upon unlawful procedure, including violation of the Due Process Clause of the Fourteenth Amendment.

e. Unsupported by substantial evidence.

f. Arbitrary and precious and an abuse discretion.

3. Specifically, but without limitation, the decision rests upon findings of past procedural irregularities by Plaintiffs, but Plaintiffs had no notice prior to decision that any such procedural irregularities were alleged or to be considered and were prejudiced by such lack of notice. The decision also orders Plaintiffs to pay certain amounts for treatment rendered by various persons to John Doe, Jr., although Plaintiffs received no notice that such payments were in issue.

4. Jurisdiction of this Court is based on Mass. G.L. c. 30A, § 14, the pendent jurisdiction of this Court, the provisions of Title 42 U.S.C. § 1983 and Title 28 U.S.C. § 1343, and Title 28 U.S.C. § 1331, there being more than Ten Thousand ($10,000) Dollars in issue, exclusive of interest and costs.

By Plaintiff's Attorneys,

DAVID BERMAN,
JOHN F. ZAMPARELLI,
Town Counsel

/s/_____
DAVID BERMAN

[The following was filed in the District Court on December 24, 1980.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TOWN OF BURLINGTON, Plaintiffs	CIVIL ACTION NO. 80-359-Z
-VS-	FURTHER STATEMENT IN OPPOSITION TO APPLICATION FOR PRELIMINARY INJUNCTION
DEPARTMENT OF EDUCATION, ET AL., Defendants.	

Plaintiffs further oppose the application of Defendant Department for a Preliminary Injunction on the grounds that Defendant Does refused to make John Doe, Jr., available for a evaluation in the summer of 1980 when requested to do so by Plaintiffs at the suggestion of this Court. Such an evaluation would have resulted in an IEP for John Doe, Jr., for 1980-1981. Attached to this statement and made part hereof are copies of a letter from Plaintiffs' Counsel to Counsel for the Does dated July 5 [*sic*], 1980 and August 15 [*sic*], 1980 and a copy of a letter from the Does' counsel dated August 21, 1980.

On December 17, 1980 counsel for the Does apparently recognized that his clients had unlawfully refused to cooperate and send Plaintiffs' counsel and counsel for Defendant Department a letter dated December 17, 1980, a copy of which is annexed hereto. The conditions stated in counsel's letter for an evaluation are intolerable — they would require the convening of an evaluation group not previously employed by Plaintiffs for one case only — and have no basis in law. Moreover, it would be impossible for Plaintiffs to evaluate John Doe, Jr., over the Christmas holidays.

Since the purpose of the Preliminary Injunction sought by Defendant Department is to keep John Doe, Jr., in the Carroll School for the remainder of the 1980-1981 school year and since Plaintiffs have been frustrated by action of the Does in their efforts to learn whether the Carroll School is even an appropriate

placement for that year, it follows that the application for Preliminary Injunction should be denied. See *Tuftco v. United States*, 614 F.2d 740, 746 (Ct. Ct. 1980) and case cited.

By Plaintiffs' attorneys,

JOHN F. ZAMPARELLI
DAVID BERMAN
TOWN COUNSEL

/s/_____

DAVID BERMAN
100 George P. Hassett Drive
Medford, Massachusetts 02155
Tel: (617) 395-7520

[The following letters were attached to the preceding Statement in Opposition.]

July 8, 1980

Mr. Gerald B. Gallagher, Esquire
77 Great Road
Acton, MA 01720

Re: TOWN OF BURLINGTON v. DEPARTMENT OF EDUCATION, et al., No. 80-359-Z

Dear Mr. Gallagher:

The Town of Burlington is ready and willing to carry out prior to September 26, 1980 an evaluation of John Doe, Jr. Preparatory to our investigation, we must have the reports of the Carroll School. Will you please send them to us?

Thank you.

Sincerely,

David Berman

August 18, 1980

Mr. Gerald B. Gallagher, Esquire
77 Great Road
Acton, Massachusetts 01720

Re: TOWN OF BURLINGTON v. DEPARTMENT OF EDUCATION, et al., No. 80-359-Z

Dear Mr. Gallagher:

I wrote to you on July 8, 1980 suggesting that you send us certain documents so that we could commence the review which Judge Zobel asked us to conduct prior to the hearing set for September 26, 1980. To date you have not responded to that letter. Would you please do so.

Sincerely,

David Berman

cc: Michael Broad, Esquire
Assistant Attorney General

August 21, 1980

David Berman, Esq.
100 George P. Hassett Drive
Medford, Massachusetts 02155

Re: TOWN OF BURLINGTON v. DEPARTMENT OF EDUCATION, et al.; No. 80-359-Z

Dear Mr. Berman:

This letter is in reply to your letters of July 8 and August 18, 1980.

At the time of the July 7, 1980 hearing, it was suggested that the town, under 766, might make a review of Junior Doe's status. I assumed that the town intended to proceed under its statutory and regulatory obligations in this matter.

After the hearing, Junior's parents, on the basis of prior medical consultations, expressed great concern about the effect of such a review. Doctor Lott's opinion has been that Junior has been much examined, tested by your clients (some of which was unauthorized), and there is a reasonable reluctance on their part to permit further casual intrusions into the life of Junior.

Your letter of July 8, 1980 set forth that "The Town of Burlington is ready and willing to carry out prior to September 26, 1980 an evaluation of John Doe, Jr." Implicit in your letter is a disclaimer of any obligation on the part of Burlington to carry out the evaluation.

In view of the pending litigation, your clients' refusal to pay according to the order of the Department of Education, your clients' refusal to answer my clients' applications of May 5 and 20, 1980 as required by G.L.C. 76, Sec. 16, and no showing on your part of personnel qualified to conduct the evaluation, I see no reason why my client should provide you with reports and other information.

Very truly yours,
/s/
Gerald B. Gallagher

GBG:md

December 17, 1980

Department of Education of
the Commonwealth of Massachusetts
c/o Michael Broad, Esq.
Assistant Attorney General
One Ashburton Place
Boston, MA 02108

Town of Burlington
and the School Committee of
the Town of Burlington
c/o David Berman, Esq.
100 George P. Hassett Drive
Medford, MA 02155

Re: Town of Burlington — John Doe

Gentlemen:

In respect to the above matter, I invite your attention to the fact that there is no outstanding IEP (so called) for John Doe, Junior, for the year 1980-81. It is my understanding and position that it is the obligation of Burlington to provide the IEP.

There have been several letters which have gone back and forth between the school authorities in Burlington and this office or my client. In short, the problem seems to be the ambiguity of the status of the parties, inasmuch as Burlington is both an adversary and a statutory provider of educational services.

From the Does' point of view, we are willing to provide court discovery according to the F.R.C.P. We are also willing with controls to have the boy examined by competent medical personnel. However, we are not receptive to suggestion that personal and private matters be released to adversaries in court proceedings who wear one mask for obtaining the information and another for utilizing it.

With this in mind, I suggest that an arrangement be made whereby an IEP be drawn. Such an arrangement should provide (a) qualified people to examine John Doe, Junior (if needed); (b) the persons compiling the information and drafting the plan be not adversaries in any court proceeding or under the influence of an adversary; and (c) compliance with the statutes and regulations governing the drafting of IEPs.

Very truly yours,
/s/
Gerald B. Gallagher

GBG:rip

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1527.

TOWN OF BURLINGTON, ET AL.,
Plaintiffs, Appellants,

v.

THE DEPARTMENT OF EDUCATION OF
THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants, Appellees.

MEMORANDUM AND ORDER
Entered January 28, 1981

We have examined the record and appellants' brief. We cannot say that appellants have made a sufficient showing of likelihood of success on the merits to meet their burden in applying for a stay. There is some force to the argument that the Does may prove unable to reimburse the Town if the Town ultimately prevails. See App. 42. By the same token, however, if the Does are as reliant as appellants claim on Town funding, a stay at this juncture, if later deemed erroneous, will unjustly deprive John Doe, Jr. of the special education to which he has been found entitled. John Doe, Jr., therefore, seems to be the party most vulnerable to irreparable injury. Finally, the Town's contention that the Does unjustifiably shielded John from an evaluation in 1980 has not been acted upon by the district court and is evidently presently before that court in opposition to the Department's motion for a preliminary injunction. Without the benefit of the district court's opinion on the issue, we decline to consider it at this time.

The motion for a stay is denied.

By the Court:
Clerk.

[Cert. c: Clerk, U.S.D.C., Mass.: cc: Messrs. Berman, Broad, and Gallagher]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 80-359-Z

TOWN OF BURLINGTON, et al.

vs.

THE DEPARTMENT OF EDUCATION OF
THE COMMONWEALTH OF MASSACHUSETTS, et al.

ORDER

ZOBEL, D.J.

Both parties having moved for a determination concerning plaintiff's liability to the defendant John Doe for reimbursement of expenses paid or now due in connection with the continuing educational placement of John Doe, Jr. at the Carroll School in Lincoln, Massachusetts, it is,

ORDERED that pending a final determination on the merits, the town of Burlington shall pay forthwith to the Carroll School all monies due and owing for the tuition of John Doe, Jr. at the Carroll School for the current school year; and it is further

ORDERED that pending a final determination on the merits, the town of Burlington shall reimburse the defendant John Doe, Sr. forthwith for all costs and expenses incurred and already paid by him in connection with the placement of John Doe, Jr. at the Carroll School in the amount of $8,837.97. Federal law requires that "the child shall remain in the then current educational placement of such child" during the pendency of any proceedings with respect to the child's placement

and until all such proceedings have been completed. 20 U.S.C. § 1415(e)(3). This mandatory provision, designed to preserve the status quo, has been held in this case to require that John Jr. be maintained at the Carroll School during the pendency of this litigation. Judgment and Memorandum of Decision November 19, 1980. The judgment at that time included an Order that the town of Burlington pay the costs of tuition at the Carroll School as well as incidental expenses for medical and psychological evaluations of John Jr. Doe Sr. has paid some or all of the costs covering John Jr.'s tuition at the Carroll School for past school terms, as well as other expenses. The Town is hereby ordered to reimburse him for those expenses which have already been paid.

February 12, 1981
DATE

/s/ Ryan W. Zobel
DISTRICT JUDGE

[The following was filed in the District Court on November 24, 1981.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TOWN OF BURLINGTON, ET AL.,
Plaintiffs

CIVIL ACTION
NO. 80-359-Z

VS.

MASSACHUSETTS DEPARTMENT OF EDUCATION, ET AL.,
Defendants.

MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT

Plaintiffs respectfully move that the Court enter summary judgment setting aside the decision of Defendant Department of Education, in so far as it orders Plaintiff to pay tuition and related expenses for John Doe, Jr., at the Carroll School and ordering Defendant Does to return to Plaintiffs any and all monies received for such tuition on related expenses on the grounds that Defendants, having changed their son's placement to the Carroll School while proceedings were pending, are not entitled to any reimbursement for tuition.

In the event that summary judgment is denied upon the aforementioned ground, Plaintiffs move that the Court enter summary judgment determining (a) that its jurisdiction in this action is limited to determining the appropriate placement of John Doe, Jr. for the 1979-1980 school year, (b) that Plaintiffs are not liable for any tuition or related expenses for the education of John Doe, Jr., at the Carroll School beyond the 1979-1980 school year, where the parents declined to make John Doe, Jr., available for evaluations after that time, and (c) that Plaintiffs are, therefore, entitled to be reimbursed for any and all amounts expended by them for tuition or related expenses at the Carroll School after the 1979-1980 school year.

By their attorney,
/s/ DAVID BERMAN

Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-433.

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,
v.
DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO A/K/A JOHN DOE, SR., AS HE IS NEXT FRIEND OF MICHAEL PANICO A/K/A JOHN DOE, JR.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JOINT APPENDIX

Volume II

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JUDITH S. YOGMAN,
Assistant Attorney General

Petition for Certiorari Filed September 18, 1984
Certiorari Granted December 3, 1984

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[Transcript of a portion of the trial held on May 13, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes the testimony of Mrs. Jean Arin, Core Evaluation Administrator for the Town of Burlington public schools, a witness called by the plaintiffs, found at Transcript Volume I, pages 66-118, and reproduced in the Record Appendix, Volume II, pages 66-118.]

[66] JEAN ARIN, Sworn
Direct Examination by Mr. Berman

Q Please state your name.

A Jean Arin.

THE REPORTER: Spell your last name, please.

THE WITNESS: A-r-i-n.

Q And where do you live?

A Lexington, Massachusetts.

Q What is your profession, please?

A I'm Core Evaluation Administrator for the Burlington Public Schools.

THE REPORTER: Core what, please?

THE WITNESS: Core Evaluation Administrator for the Burlington Public Schools.

[67] THE REPORTER: Thank you.

Q. How long have you held that position?

A Seven years.

Q And will you please tell her Honor what your background in education are for you to become Core Evaluation Administrator.

A I have a Bachelor's degree in Elementary Education and Special Education from Fitchburg State College; a Master's degree in Special Education from Indiana University; and graduate work at Indiana University and UCLA.

Q And what is your experience, please, in the field of education?

A I have been Director of Special Education at the Lexington Nursery/Kindergarten School in Lexington. I was also the Special Education teacher at Glendale High School in Glendale, California. I was also the Principal of the Headly School, which is a training school, a self-contained school for multiply-handicapped youngsters at Indiana University.

I've also been Principal of Temple Shalom Elementary Religious School; Principal of the Concord-Lincoln Jewish Study Group School in Concord; also supervised a pre-school program at Temple Emunah in Lexington, and Second Grade teacher there; a [68] regular Sixth Grade classroom in Monrovia, Indiana.

I believe that's it.

Q When did you come to work for the Town of Burlington?

A August 1975.

Q And are you still employed there?

A Yes.

Q And have you been employed there continuously ever since?

A Yes.

Q What are your duties as Core Evaluation Administrator, please?

A My responsibilities include the supervision of the evaluation process for all children who are referred for a determination of Special Needs.

It is my responsibility to insure that evaluations are carried out for these children and that if, indeed, any Special Needs are found, then educational planning is developed for them.

It's also my responsibility to direct staff members to carry out various assessments to make those determinations.

And also coordinate the meetings and act as full Chairperson for these meetings.

Q Did you ever come across Michael Panico as a student?

A No.

[69] As a student?

Q I mean — I'm sorry. Strike that.

Did you ever become aware of a child named Michael?

A Yes.

Q When was that, please?

A On June 3rd, 1977.

Q And how did you become aware of it at that time?

A I received a telephone call from Mr. Panico, requesting if I could carry out an evaluation for his son.

Q Did you carry out an evaluation at that time?

A Yes, I did.

Q And —

THE COURT: Mrs. Arin, what does an evaluation mean?

THE WITNESS: An evaluation, first, the first step is that there are a number of people that may make a referral. A parent, a teacher, a guidance counselor, a principal, any member of the school staff, may make a referral indicating that there's some need for the child and that the child is not progressing at the rate they think the child should.

THE COURT: That's how you start the evaluation.

THE WITNESS: Yes.

THE COURT: But then what does the evaluation [70] itself consist of?

THE WITNESS: There are two elements. There is either a full evaluation of a partial evaluation.

A full evaluation —

THE COURT: What was done in Michael's case?

THE WITNESS: A full evaluation.

THE COURT: Okay. Then let me hear what that involved.

THE WITNESS: A full evaluation entails a medical report indicating how the child is doing physically. It also contains —

THE COURT: How do you get that?

THE WITNESS: We get that through a series of forms that are sent out to the parent at the time of referral.

THE COURT: So the medical report comes from the child's own physician?

THE WITNESS: It's a form that we present from our packet, but it is sent to the parents, to the parents' own pediatrician.

In that same packet of referral is the Home Assessment Form, permitting the Social Worker to either make a visit at the home or in the school with the parents to determine developmental issues prior to the child coming to school, and any home environment [71] or how the child relates in playing outside with neighborhood children, et cetera.

THE COURT: Where does the Social Worker come from? Is that person on the staff of the School System?

THE WITNESS: Yes. The Social Worker is part of the full team.

THE COURT: So the Social Worker visits the home?

THE WITNESS: Or the school at the parent's discretion. The parent has the right to choose either a home visit or a school visit to meet with the Social Worker.

THE COURT: But it's a visit with the parents?

THE WITNESS: Yes.

Essentially, the Social Worker tries to gather a parental view of what the issues surrounding the youngster are.

THE COURT: What's the next item?

THE WITNESS: The next item will be, according to the area of need on the referral, will be a learning assessment, usually carried out by the resource person, the Learning Specialist.

THE COURT: That is a teacher within the School System?

[72] THE WITNESS: Correct.

THE COURT: Who reports on his or her observations of the child?

THE WITNESS: No. It is a person within the School System who is a specialist in testing the youngster for any types of learning problems.

THE COURT: So is the child tested at that point?

THE WITNESS: Yes.

THE COURT: Within the School System?

THE WITNESS: Yes.

In addition, there is a Speech and Language Pathologist who tests the expressive and receptive language level of the youngster.

THE COURT: Is that part of the learning assessment or is that something different?

THE WITNESS: That can be part of the full evaluation. It's not necessarily always included.

THE COURT: Let me go back a moment.

When you started to explain the learning assessment, you told me it was based on testing in the school. But what is the testing, now?

THE WITNESS: The testing is usually learning disability screening, tests like the ITPA, the Detroit Test of Learning Disabilities, various assessments [73] that the Learning Specialist will give, according to what the referral needs indicate. Then those types of tests are selected for testing.

In addition, the Learning Specialist may also give achievement testing on how the youngster is functioning in reading, writing, arithmetic, spelling within the classroom.

THE COURT: And then you were talking about a Speech Pathologist?

THE WITNESS: Yes.

A Speech and Language Specialist is also another professional staff member who may be included on a full team if the referral indications are such that there's questions about auditory processing; if there's questions about expressive language; if there may be simple speech indications, like stuttering, lisping, et cetera.

THE COURT: Was that used in this case?

THE WITNESS: No. The speech and language assessment was not carried out.

THE COURT: Then what's the next step?

THE WITNESS: The next step would be the Classroom Teacher's Assessment. And that is a form that is handed out from the evaluation where the teacher writes down the best type of physical area where the [74] child learns best in small groups or separately, one to one; teachers' impressions of how the youngster is doing academically within the classroom; what reading group they're in; what various math groups they're in; their overall behaviors in how they are completing tasks, et cetera.

THE COURT: And the next step?

THE WITNESS: A Psychological Report is carried out.

THE COURT: Where does that come from?

THE WITNESS: That's from the Staff Psychologist who is also a member of the full team.

THE COURT: And docs that involve testing or interview or what?

THE WITNESS: Testing.

THE COURT: So a Psychological Report based on testing?

THE WITNESS: Yes.

THE COURT: That's done within the school, as well?

THE WITNESS: Yes.

THE COURT: What else?

THE WITNESS: There is also an Educational Status Review, which is done by the Building Counselor of the youngster, which is overall a survey of the types [75] of services within the school that the youngster has received that are outside the areas of Special Ed. For instance, remedial reading, Title I tutoring, any type of special help, adaptive physical education that a youngster has had.

THE COURT: Anything else?

THE WITNESS: I believe that covers it.

THE COURT: Now —

THE WITNESS: I'm sorry. There could be — forgive me. There could be a Vision & Hearing that may be —

THE COURT: That wasn't involved here?

THE WITNESS: No.

That could be carried out by the nurse if there's any question that the child may not be hearing. A screening would be done by the School Nurse to make that type of determination.

THE COURT: Now, of the various things that you have mentioned that constitute an evaluation, a full evaluation, did you have, in this case, the medical report?

THE WITNESS: Yes.

THE COURT: And the home assessment?

THE WITNESS: Yes.

[76] THE COURT: And the learning assessment that was based on the particular screening that had reference to the referral needs, but not the speech and language specialist?

THE WITNESS: Correct.

THE COURT: And did you have classroom teachers assessments?

THE WITNESS: Yes.

THE COURT: And a psychological report?

THE WITNESS: Yes.

And forgive me, there was one more report that we included in that, and that was a Reading Specialist who is not necessarily on the full team, but can be requested to use her services to do a total reading test. The Reading Specialist within the building, just to test the youngster on reading level. And that was also carried out, because that was the primary need for the referral in '77.

THE COURT: Does the Reading Specialist do testing?

THE WITNESS: Yes.

THE COURT: You call this a Reading Specialist Assessment or what?

THE WITNESS: Reading Specialist Assessment.

THE COURT: Now, when you have collected [77] all of these test results and assessments, what's the next step?

THE WITNESS: Once all the tests have been completed, then a date is set up in order to share all the assessments with the parents. And all the team members come to the —

THE COURT: Does that have a name?

THE WITNESS: It's called the Team Evaluation Meeting.

THE COURT: I'll learn a whole new language.

Okay.

At that, you share with the parents the results of the testing?

THE WITNESS: Yes.

THE COURT: Do you make recommendations at that time?

THE WITNESS: Yes. It is presented orally; and after the meeting, a packet of the assessment is sent to the parent and to

whomever the parent wishes the information to go. The parent can sign a Release of Information if the parent wishes to submit all the information to a hospital or a counseling clinic or any external agency that might support the child.

THE COURT: And then what happens?

[78] You shared with the parents.

THE WITNESS: At that meeting, a determination is made through that team evaluation process whether or not a special need exists, according to those assessments.

THE COURT: And if it does?

THE WITNESS: And if it exists, then an Individual Educational Plan for the child is developed.

THE COURT: All right.

I guess that's, at least for the present purposes, the end of the line; is it not?

MR. BERMAN: May I just understand whether that was for '77 the answers were given with this, specific answers? I know you were generally going into the process.

THE COURT: Well, I understood that Mrs. Arin testified that these various things were done, except there was no Speech Pathologist, but there was a Reading Specialist Assessment, and that all of these things were, in fact, done with Michael.

And I understood not in '77, but in —

THE WITNESS: This was on June 23rd, 1977.

THE COURT: Oh, in 1977.

MR. BERMAN: Yes. Thank you.

Q Mrs. Arin, based upon the assessment, did you, in fact, [79] develop an Individual Educational Plan for Michael for the school year 1977-1978?

A No.

Q And will you explain why you did not?

A The assessments, as they were presented, showed that the home assessment, in essence, showed that Michael was not liking school; that he was fearful of making —

THE REPORTER: Michael was what, please?

A Not liking school. That is what the parents shared with the Social Worker. Not liking school and fearful of making mistakes.

Also in the home assessment came out that the parents had hired a tutor for reading for the summer for Michael. The parents also raised to the Social Worker the issues surrounding the retention issues that were coming up in June of '77.

THE REPORTER: Tension or retention?

THE WITNESS: Retention.

A [Continuing.] The psychologist's report indicated that there were attentional factors that were poor for Michael, but he saw no severe emotional problems that might impact upon his education. He found, however, that his motivation for achievement was low.

The Wechsler Intelligence —

Q Mrs. Arin, I don't want to interrupt you, but the [80] question was: Why you didn't develop an IEP for the 1977-'78 school year?

A According to the assessments, there were no special needs that were indicated.

Q All right.

Directing your attention to the 1977-1978 school year, were you again made aware of Michael in the course of that year?

A Yes, I was.

Q And did you, at the end of that year, devise an Individual Educational Plan for Michael?

A Yes.

Q Will you tell her Honor what that plan was?

A It was a plan based upon the assessments from the Mass. General Hospital, submitted from the Cortical Function Laboratory. It included an Individual Educational Plan that called for Michael to be in the Learning Center for one hour a day, five days a week.

THE COURT: Wait one second. Let me go back a moment.

You developed an Individual Educational Plan for Michael in June of '78?

THE WITNESS: It was in March of '78.

THE COURT: In March of '78.

[81] And that was without going through this entire process again, but on the basis of new information that had come to you; is that correct?

THE WITNESS: That's correct.

THE COURT: And that new information was a report from where?

THE WITNESS: Mass. General Hospital, Cortical Functions Lab.

THE REPORTER: Cortical?

THE WITNESS: Cortical Functions Laboratory, I believe is the title.

THE COURT: And that plan was developed to be implemented during the 1977-'78 school year?

THE WITNESS: It was to be implemented within ten days after our meeting, March 1978, through March of 1979.

Q Did you present this plan to Mr. and Mrs. Panico?

A Yes.

Q Did they accept it?

A Yes.

Q Was the plan implemented?

A Yes.

Q Now, was the plan implemented exactly as you devised it?

A Yes.

[82] Q And there's been — there is a —

THE COURT: I'm sorry to interrupt again.

And that planned called for what?

THE WITNESS: Learning Center Specialist, five times a week, for 50 minutes. And counseling, one time a week, for 30 minutes, with the School Counselor.

Q Will you please tell her Honor what the Learning Center is?

A The Learning Center is an environment within the regular school building that has youngsters who are in need of remediation or reinforcement of particular skills to maintain them at grade level or to improve their level in whatever academic area of need is required.

It is a setting where there are small groupings with a Learning Center Specialist. It's also a center where youngsters can come in and lead back to the mainstream, according to their needs.

Q Now, who is the Reading Specialist in the Learning Center that was assigned to Michael?

A Kathryn Black.

Q Was she a regular teacher of the Town, a regular Reading Specialist of the Town?

A Yes.

Q At some time Mrs. Black had another student assigned [83] to her; is that correct?

A Yes.

Q And this was during the hour in which she met with Michael?

A Yes.

Q And was that part of your plan?

A No.

Q Was that contrary to your plan?

A Not necessarily, no.

Q How did Mrs. Black's plan work, please?

A I'm sorry. I didn't hear your question.

Q How did Mrs. Black's — no, my question is so bad.

Will you describe the procedures under which Mrs. Black was to operate with Michael under your plan?

A Under the plan we had developed, Michael was to report to the Learning Center to Kathryn Black, sit down with him

and do various activities to help him in his phonetic development and to increase his reading skills.

Q Would he spend the full 50 minutes with her?

A I'm sorry?

Q Would she spend the full 50 minutes talking to him?

A Not necessarily.

Q Well, what would she do?

[84] A She might spend a considerable amount of that time talking with him, but then give him independent work to complete.

Q Now, in March of '79, was there a suggestion for another evaluation?

A I —

Q Or in the spring of 1979, was another evaluation suggested?

A Yes.

Q By whom?

A It was suggested by me in a telephone call to Mr. Panico.

Q And was this full evaluation carried out?

A Yes. With the exclusion of the Social Worker's assessment and the medical assessment.

Q Why was the Social Worker's assessment excluded on this occasion?

A The Social Worker's assessment is usually done at an initial full Core and not required to be done for three years hence.

Q Why was the medical assessment excluded at this evaluation?

A The parents had been continually involved with Mass. General Hospital and medications for Michael, surrounding his migraine headaches. And at that time, [85] Mr. and Mrs. Panico were in relatively close contact about changes in medication and the needs for Michael. And so that a medical evaluation might seem redundant at that time since he was under medical care.

Q Was the panel to receive or were the Core evaluators to receive these medical assessments that were being done at the Mass. General Hospital?

A We had asked for them. We did not receive them. Only through word of the parent.

Q Did you ask — whom did you ask for them?

A In 1979?

Q Please.

A I don't believe I asked for them.

Q Didn't you just say the parents were asked for them?

A Yes. I had constantly been asking the parents for various assessments. They sent us the assessment in '78 from the Cortical Function Lab., and that was the only one we received. And one letter from Dr. Lott, explaining that Michael was making progress.

Q Directing your attention to 1979, did the parents participate in the Core evaluation?

A Yes.

Q And was there a team assessment?

A Yes.

Q And where did that take place, please?

[86] A At the Memorial School.

Q And will you tell me who participated in it, please?

A Yes. To the best of my recollection, it was the classroom teacher, Sally Hennessy, John McAleer, Myra Fournier, Kathryn Black, the parents and myself.

Q And what date was that, please?

A That was on June 4th, 1979.

Q How long did the assessment last?

A Team meeting?

Q Yes. The team meeting last?

A The team meeting lasted about, I would say, an hour and fifteen minutes. I don't remember exactly.

Q When it was over, did the parents say anything concerning it?

A They talked about the possibility of carrying out an independent evaluation at that time through Dr. Lott.

Q Did you form an opinion, based upon the meeting, as to what would be an appropriate placement for this child for the 1979-1980 school year?

A Yes.

Q And what did you consider would be an appropriate placement?

A I believed that John McAleer's classroom would be the appropriate placement.

[87] Q And will you state the reasons why you concluded this?

A Yes. Michael's progress in reading, although during the year it showed some improvement, was still not improving to the area that we felt his potential might be able to go.

Also, he was still unable to take the phonetic skills and apply them to a fluid reading approach.

Counseling reports from the counselor also suggested that he was still having trouble expressing his feelings, getting along well, in feeling himself that his own self-worth was being questioned with the counseling sessions, and she felt that perhaps additional counseling might be necessary outside of the school.

THE REPORTER: Outside of the school?

THE WITNESS: Yes.

Q Did you at some time draw up an Individual Educational Plan for Michael for the 1979-1980 school year?

A Yes, I did.

Q And when did you do that?

A I did that on June 26th, 1979.

Q And will you explain to her Honor why you waited from June 4th to June 26th to draw up an Individual Educational Plan for this child?

A In discussions with the parents, we had received a [88] number of the assessments through the annual review that we

had held in June. And clearly, there were a number of assessments that the parents were confused about. They wanted to be able to get other additional information. They also had an appointment scheduled with Dr. Lott and wanted to be able to go over the assessments with him.

In addition, at that time, I suggested to them that perhaps they would like a totally independent evaluation, and they said they would think about that. I asked them if it would be all right if I contacted Dr. Bauman for an individual evaluation to be held. They said, fine, go ahead, but they'll call me back regarding their decision either to go with Dr. Lott or to go through with Dr. Bauman.

I contacted Dr. Bauman, made arrangements for her to have an independent evaluation for Michael. It was the very end of the year and she very cooperatively consented that she would do it in light of the difficulty at the close of the school year.

On, I believe it was, May 30th or 31st, I can't recall, that I received a note that Mr. Panico had chosen to do all the evaluations at Mass. General and that there would be further evaluations coming.

At that point, I told him that, fine, I'll [89] be happy to hold up the writing of an IEP until those evaluations are in, and then we'll be able to present it.

Q Did you ever receive those further evaluations?

A No.

Q Why did you then prepare the report which you were holding up?

A I'm sorry?

Q Why did you then on June 26th prepare this report that you had been holding up until these evaluations came?

A A telephone call came into my office to my secretary. It was a telephone call from Mr. Panico, stating to my secretary that he was demanding the Educational Plan; it was already ten days overdue, and that he was planning to reject it anyway.

At which point, I proceeded to draw up an Individual Educational Plan. And that — oh, I'm sorry — he was going to contact the Superintendent that I had not fulfilled the ten days.

Q I show you a document which I believe — if your Honor please — is in evidence as — I'm sorry, I must have gotten the wrong sheet and wondering why I can't find it.

It's in evidence as S — it's the [90] Individual Educational Plan of June 26th or 27th.

THE COURT: Is it in the record appendix?

MR. BERMAN: It's not in the record appendix, your Honor, but it's an exhibit, and the exhibit numbers are listed in the record appendix, which is why I'm referring to to the record appendix. I know —

MR. ROSENBERG: P-41

THE COURT: P-41?

MR. ROSENBERG: It's in both sets of exhibits.

MR. BERMAN: It is in P-41 and it's also an S exhibit and I just can't find it as an S exhibit.

I think the two references are S-47, which is the Town's exhibit, and P-41, which is the parents' exhibit. I believe it's the same thing.

THE COURT: Am I to take from this that there are two copies of virtually every document in this bunch? Only of some?

MR. ROSENBERG: I believe of some, your Honor. I was not at the Administrative Hearing, but there are two sets, one of the parents' exhibits, one of the Town's, a lot of them are duplicative. And the Bureau's, I beg your pardon. There are also some exhibits from the Bureau.

MR. BERMAN: There's a vast amount of duplication, your Honor. It is S-47.

[91] Q Would you please identify the sheet in front of you?

A It's the Educational Plan for Michael Panico for the period covering June 1979 to June 1980.

Q And who drew that plan?

A I did.

Q And have you an opinion, first of all, as to whether that plan adequately addresses the problems of Michael for the 1979-1980 school year?

A Yes.

Q What is your opinion?

A I believe it adequately meets the needs that Michael was evidencing at that time.

Q And will you give the basis for your opinion?

A Michael's reading was not progressing. He needed to learn the application of phonetic skills. He was still having difficulty in the fluency of reading. He needed to improve his handwriting skills. He needed to get a better understanding with directionality for his handwriting.

Also lists areas of emotional needs, like self-confidence in the academic areas, to provide him with success oriented activities where he could gain that. Also would avail him of an opportunity to be able to express his feelings. And also to improve his attention span and diminished distractability, [92] and to be able to function —

THE REPORTER: Diminished what, please?

THE WITNESS: I'm sorry?

THE REPORTER: Diminished what?

THE WITNESS: His distractability.

A [Continuing.] And also permit him to carry out independent tasks with completion, independently.

Q And do you know a person named John McAleer?

A Yes, I do.

Q How long have you known him?

A For seven years.

Q And in what capacity have you known him?

A I've known him as the teacher for the transitional classroom at the Pine Glen School. And I am the Core Evaluation Administrator.

Q In the summer of 1979, how many times had you been in his classroom?

A Perhaps three times. In the spring, summer of —

Q I'm sorry. Prior to that time?

A Oh, prior to that time?

Q Yes. Prior to the summer of —

THE COURT: Mr. Berman, the Reporter has lost you.

MR. BERMAN: I'm sorry.

THE REPORTER: The spring and summer of [93] what?

MR. BERMAN: Why don't I start over?

THE REPORTER: "In the summer of 1979, how many times had you been in his classroom?

"Answer: Perhaps three times. In the spring, summer of. . ."

THE COURT: What was the remaining answer?

THE WITNESS: In the spring of 1979, from March to June, I was probably in Mr. McAleer's classroom about three times.

Q And prior to the summer of 1979, how many times total have you been in Mr. McAleer's classroom?

A Approximately 25 to 30 times.

Q How many times had you met with Mr. McAleer outside his classroom?

A Approximately 90 to 100 times.

THE COURT: Are you asking professionally, socially, or otherwise?

Q Were all these meetings professional meetings at your request?

A Sadly, yes.

Q Now, did you have an opinion as to whether Mr. McAleer could implement this plan that you had drawn up for Michael?

A Yes.

[94] Q And what was your opinion?

A My opinion was that John McAleer could implement the plan for Michael Panico extraordinarily well.

Q And will you give the basis for that opinion, please?

A Yes. In the past years at Burlington, John's classroom was a highly structured environment. We had placed children in his classroom previously. John McAleer was an extraordinarily sensitive teacher, able to understand what the needs of the children were, and to provide for them academically, according to those needs on an individual basis.

He also permitted opportunities within that classroom for children to develop self-esteem, for children to be able to feel comfortable with their accomplishments, and to be able to meet with success.

Also, within the building, Mr. McAleer had demonstrated, repeatedly, his ability to take the youngster from his classroom and, when appropriate, move that youngster into a mainstream environment, within those subject areas, that the child had made significant and adequate progress.

John McAleer was constantly in touch with parents, holds monthly meetings with the parents of the children in his classroom to keep them abreast of the children's progress within the program.

[95] Moreover, Mr. McAleer is a teacher within the building and has access to the remaining staff where he can share very closely any mainstreaming needs of any children that he would be able to provide — that he would be able to transfer over to a mainstreaming type program.

Q Have you an opinion as to whether or not educating Michael in Mr. McAleer's classroom in the 1979-1980 school year would have been educating him in the least restrictive environment in which he could be educated, consistent with his educational need?

A Yes.

Q What is your opinion?

MS. JANOS: Objection.

THE COURT: Is there an issue about that?

MR. BERMAN: Well, your Honor, it certainly is one of the issues that is opened up by the general issue. There are three considerations I —

THE COURT: What does "least restrictive" mean?

MR. BERMAN: Well, I —

THE COURT: What's your objection, Ms. Janos?

MS. JANOS: My objection is that is a matter for the Hearing Officer and for you to decide. That is an issue in the case, final determination.

[96] THE COURT: Oh, of that issue, I'll take her expert opinion, if it's relevant.

But I don't understand what "least restrictive" means. Maybe you better explain.

MR. BERMAN: Very good.

Q Will you explain to her Honor what you meant by the least restrictive environment?

THE COURT: I think of it in terms of mental hospitals and either keeping people in or taking them out.

A The least restrictive environment, as I understand it, is an environment wherein a youngster will be able to function, according to what his needs are, in a separate area. And then, at the same time, have an opportunity to be mainstreamed in those areas that he can.

"Least restrictive," within the setting of John McAleer's, it is in a public school, it therefore provided the opportunity for mainstreaming as soon as possible.

Q And did you have any intention to suggest mainstreaming to the parents as soon as possible if Michael had been placed in that classroom for the 1979-1980 school year?

MR. ROSENBERG: Objection.

[97] THE COURT: Sustained.

MR. BERMAN: I offer to prove that the answer would have been yes.

Q Did you ever talk to Michael's parents about mainstreaming from John McAleer's classroom?

A I personally?

Q Yes.

A Yes.

Q When?

A I believe it was at the June 4th meeting when Mr. McAleer was present at the meeting, and Mr. McAleer described his program and the opportunity for mainstreaming.

Q What did you say?

A I said that, indeed, we had done it in the past and we would continue to do that, particularly in Michael's case, where math was an area, would be the first area we would look to mainstream him.

Q Why would math be the first area in which you would look to mainstream him?

A That was his most successful area of academic functioning.

MR. BERMAN: I have no further questions of Mrs. Arin.

THE COURT: Mr. Rosenberg.

MR. ROSENBERG: Yes, thank you, your Honor.

[98] Cross-Examination by Mr. Rosenberg

Q Mrs. Arin, is it my understanding that what the phrase you just discussed with her Honor, "least restrictive," also contains another adjective after that, "least restrictive appropriate" plan?

A I'm sorry. I don't understand your question.

Q The plan that must be drafted under the Chapter 766 Regulations must not merely be the least restrictive plan, it must be the least restrictive appropriate placement?

A Adequate and appropriate.

Q Okay.

A Correct.

Q Now, at what point in time was — let me strike that.

Did you, Mrs. Arin, made the decision yourself to place the child in Mr. McAleer's class?

A No.

Q Now, who made that decision?

A That decision was based upon the assessments of the team members; that I took those assessments and shared those assessments with the Director of Pupil Services.

Q And that Director was —

THE COURT: The question was: Who made the decision?

[99] THE WITNESS: I made the decision for placing.

Q Now, you made the decision to place Michael in Mr. McAleer's class?

A Correct.

Q Not Mr. Foley?

A Correct.

Q And when did you make that decision?

A That decision was finally — the final part, was thought about in May. The final decision for it came in June of '79.

Q Now, you have testified to a meeting in June, on June 4th, 1979, which is what we call the Core Evaluation Meeting; is that right?

A That's correct.

Q Okay.

Now, in fact, Mrs. Arin, wasn't there a prior meeting in May of 1979, May 25th, to be precise?

A Yes.

Q Okay.

And who attended that meeting?

A That was Mr. Cavanaugh, myself and Mr. and Mrs. Panico.

Q Now who is Mr. Cavanaugh?

A Mr. Cavanaugh is the School Psychologist on the staff of the full team.

Q Incidentally, Mr. Cavanaugh was not present, was he, [100] at the June 4th, Core Meeting?

A That's correct.

Q Now, on May 25th, you also notified, in a formal way, the Panicos, that there would be a full Core Meeting on June 4th; is that correct?

A That's correct.

Q Now, would you please tell her Honor what it was that precipitated your meeting on May 25th with Mr. Cavanaugh and the Panicos?

A I received a telephone call in May from the Building Counselor telling me that various assessments had been shared at the Memorial School surrounding Michael's progress. I asked her what assessments were carried out. She told me. I asked her if there were psychologicals carried out; she said they were not.

She also told me that the same issues of retention were being raised again. She also told me that the parents were very dissatisfied with the way things were going at the Memorial School.

Q Now, this person to whom you're referring is Myra Fournier? Is that the —

A Myra Fournier.

Q Okay.

And her position is precisely what?

A School Counselor at Memorial School.

[101] Q Now, did you not also receive on May 24th a report by Mr. Cavanaugh concerning Michael?

A The written report, no.

Q Did you receive a verbal report from Mr. Cavanaugh?

A He had told me that he was prepared to meet with Mr. and Mrs. Panico to share the results of his testing.

Q Okay.

And when did you schedule the May 25th meeting.

A I scheduled that with Mr. Panico, I believe it was the day after I — or the day of, that I spoke with Myra Fournier. He had told me that he was going — that he was confused.

It is in the record, I believe, the notes. That he was confused. He did not know which way to go. He had heard a number of assessments at the Middle School. He did not know what to do about retention. And that I asked him, "Are there any other issues?"

He said, he perhaps wanted — I asked him, would he want a psychological done? Is there anything else that he might want done? And then told him that we would reconvene for a full team meeting to share all these assessments in June.

He then told me he was going to be going to Dr. Lott, could I have the psychological assessment before his meeting with Dr. Lott, because that was [102] going to take place sometime at the end of May.

I said I would do what I could and get back to him. I spoke with the School Psychologist. He told me he could do the psychological, he could carry out a WISC and a T.A.T. and give the result to the Panicos.

THE REPORTER: Carry out a what, please?

THE WITNESS: A Wechsler Intelligence Scale for Children and a Thematic Apperception Test.

A [Continuing.] Carried them both out for Michael, and then we could meet on the 25th and present those findings.

Q Now, let me just make sure I understand it.

Is your answer to my question that you called Mr. Panico on May 24th?

A No.

Q When did you call Mr. Panico and tell him that you scheduled a meeting for May 25th?

A I don't remember that.

Q Do you remember —

A I —

Q I'm sorry. Will you finish your answer?

A Yes. I believe it was sometime after speaking with Myra Fournier, but I don't remember when.

Q Do you know when you spoke with Myra Fournier?

[103] A I would like to check in the record, if I may?

Q You may check it in the record.

A Yes. In my record, a telephone call on 5/18/79.

Q That's the telephone call that you received from Myra Fournier?

A That's correct.

Q And that was the event, was it not, that started the entire process of developing the plan in question in this situation?

A That's right.

Q Okay.

And you had a meeting on May 25th?

A Yes.

Q Would it refresh your memory, Mrs. Arin, for me to tell you that in your testimony at the Administrative Hearing you testified that it was on May 24th that you called Mr. Panico and invited him to a meeting on the 25th?

A I can check here. I don't remember that far back. I can check it.

Q Do you have records —

A I do believe I may have called him to tell him that we could schedule the meeting, that Mr. Cavanaugh had completed the testing, and that's what it was for.

[104] THE COURT: What's the purpose of this, Mr. Rosenberg? Are you trying to show that the parents were eager to meet with the school and made themselves available?

MR. ROSENBERG: No. I'll be perfect — I will explain to you what the purpose is, your Honor.

It is clear to me, and I hope eventually will be clear to you, that the entire — the primary motivation of drafting the plan and placing the child in the particular class was that the school at that time thought he had a primary emotional problem. And, in fact, I would like to proceed to ask this witness a series of questions that goes to that issue.

THE COURT: Yes, but what's the — I don't understand the import of the question as to the precise date on which the parents were invited to the May 25 meeting.

MR. ROSENBERG: Well, if I might ask one or two more questions, and if your Honor believes that the questions are irrelevant —

THE COURT: Go ahead.

MR. ROSENBERG: — I will have to live with that.

Q Is it not a fact, Mrs. Arin, that on May 24th you called up Mr. Panico and told him that you had received [105] a verbal report from Mr. Cavanaugh that Michael had severe emotional problems and you wanted to meet with the Panicos immediately?

A No, that is not true.

Q That is not correct?

A No.

Q Did you tell him that you had received a report from Mr. Cavanaugh that indicated that Michael had severe emotional problems?

A No. I told Mr. Panico that the psychological report was complete. And in the report, I wanted Mr. Cavanaugh to explain to him its findings.

Q And what were — I'm sorry. Are you finished?

A Yes.

Q And what were his findings with respect to Michael's emotional health?

A He found that he had a mild depression; that he was — had evidence of anxiety; that his competence, his self-competence was deemed in question. He had a good feeling about his body but that he was not feeling that he was able to do work well, He was not feeling good about himself.

Q Okay.

And did you not suggest, at the May 25th meeting with Mr. Cavanaugh, that because of his [106] emotional problems, Michael should be places in Mr. McAleer's class?

A I suggested that because of his academic and emotional problems, he needed to be placed in Mr. McAleer's class.

Q So you had already, I take it, informed the Panicos about Mr. McAleer's class?

A Oh, yes. At the May 25th meeting, I even encouraged Mr. and Mrs. Panico to visit the class. And they said they would, and we set up a meeting for June 2nd for them to visit the class.

Q Now, you testified earlier that the parents had requested that the Mass. General do some additional testing and evaluations of Michael?

A Yes.

Q There had been previous evaluations done at the Mass. General; had there not?

A Yes.

Q And those evaluations had indicated that Michael's problem was dyslexia; did they not?

A The Cortical Function Laboratory did not state that.

Q They didn't use that word; is that what you're saying?

A That's correct.

Q Did they find that he had visual-spatial and spatial confusion?

[107] A Yes.

Q Now, there was, was there not, also in the school record, a report from Dr. Melvyn Levine of Medford that there was an impression of dyslexia?

A That's correct.

Q Now, you testified, if I understood it correctly, that the Panicos had exercised their right to get an independent evaluation; that you were waiting for that evaluation but received a telephone call asking for the plan to be completed immediately; is that correct?

A Yes.

Q Now, the evaluations that the Panicos were waiting for were from whom?

A I believe they were going to be an assessment from Dr. Eisenthal at Mass. General Hospital.

Q And who was Eisenthal?

A He was a psychologist that was being referred to the Panicos by Dr. Lott.

Q And they were waiting for his assessment. Were they waiting for an assessment from Dr. Lott?

A I don't know that.

Q You don't know.

Am I correct that you have testified in your testimony at the Administrative Hearing, Mrs. Arin, [108] that even if you had seen the report submitted by Dr. Lott prior to preparing the plan, that would not have caused you to change your mind about what the plan contained?

MR. BERMAN: Objection. Materiality.

I withdraw my objection.

A That's correct.

Q Is Mr. McAleer's class the appropriate placement for a hyperactive child?

A It can be.

Q Is there any other class within the Pine Glen School in the academic year '79-'80 in which a hyperactive child could be placed?

A Yes.

Q Is Mr. McAleer's class the appropriate class for a child who has behavioral or emotional problems?

A I'm sorry?

It can be.

Q Is it the correct class for a child who has learning disability other than one that stems from emotional or behavioral problems?

A Yes.

Q Now, at the Core — excuse me, the Core Evaluation Meeting, was Kathryn Black present?

A The June meeting?

[109] Q Yes. I'm sorry. June of 1979.

A Yes. I don't — she was certainly invited on the memo. I don't know whether she was there or not. I can't remember.

Q What was Mrs. Black's involvement in the education of Michael?

A When? Are you talking about that meeting?

Q From March of 1978 until June of 1979, what was Mrs. Black's responsibility for educating Michael? What part did she play in educating Michael?

A She was a specialist assigned to Michael to help him improve his reading skills.

Q Would you say that in the Burlington School System, she was the person who had the primary responsibility for teaching Michael reading?

A Yes.

Q Did Mrs. Black concur with the decision to place Michael in Mr. McAleer's class?

MR. BERMAN: Excuse me, your Honor. I think that's immaterial whether Mrs. Black concurred or not.

THE COURT: Well, if there were people who were directly involved with Michael who may have expressed views concerning what was appropriate, why is that not relevant?

[110] MR. BERMAN: Well, because I don't think it —

THE COURT: The question is whether it was an appropriate plan in light of his needs at the time.

MR. BERMAN: Yes, but I don't think Mrs. Black has shown to have any expertness in this area. I mean, the fact that she was his reading teacher does not mean that she was in the position to decide whether or not Mr. McAleer's classroom —

THE COURT: Doesn't that just go to the weight of the testimony. It seems to me that this witness can tell us what was said at that meeting.

MR. BERMAN: If it is what was said at that meeting, fine.

A Okay. I have the Minutes here before me of that meeting. I cannot testify whether Kathryn Black was there or not. However, from the Minutes of that meeting, her report was shared. It said she gave him the space test. He improved one grade level. He attempted two-syllable words on word recognition tests. He had difficulty remembering, on a day-to-day basis, skills that were previous taught. And she mentioned that his oral reading was still not fluent, yet his comprehension was good.

MR. ROSENBERG: I'm going to repeat my [111] question.

THE COURT: Well, the answer clearly is that she doesn't know, because she's referring to notes that reflect only that reference to what Mrs. Black may have said.

MR. ROSENBERG: Okay.

Q Did Mrs. Black, at any time, prior to the preparation of the Educational Plan in question, tell you that Mr. McAleer's class was not the appropriate placement for Michael?

A She never did.

Q She never told you?

A No.

Q Do you know whether she told anybody else?

A I don't know.

Q You don't know?

A No.

Q Do you know what her opinion is of that subject?

MR. BERMAN: I pray your Honor's judgment.

THE COURT: Sustained.

Q And your testimony is you don't know whether — you don't recall now whether Mrs. Black was at the Core Meeting?

A That's correct.

Q Who was at the Core Meeting?

[112] A I have the notification sent that invited to the meeting was Sally Hennessey, John McAleer, Myra Fournier, Richard Cavanaugh, Kathryn Black, Becky Silverstein, Mr. Barows, Mr. and Mrs. Panico and myself.

Q I understand you have the notice.

Do you know which of those individuals, in fact, were there?

A I believe — I don't remember who was there.

Q Do you —

A I do remember John McAleer being there. I do remember myself being there. I do remember Sally Hennessy being there. I do remember Myra Fournier being there.

Q Do you remember that the Panicos were there?

A Oh, yes.

Q But you don't remember whether Mrs. Black was there?

A I don't remember.

Q Was Mr. Cavanaugh there? Do you remember that?

A I know that he was not there.

Q Was Mrs. Mason there?

A No, she was not there.

Q Was Mrs. Meade there?

A No, she was not there.

Q The only one you're not sure about is Mrs. Black; is that correct?

A That's correct.

[113] MR. ROSENBERG: Excuse me for a moment.

Q You testified earlier, I believe, with respect to the 1977 plan; is that correct?

A I'm sorry, would you restate the question?

Q Actually, I'll rephrase that. I'll withdraw that question.

You testified, did you not, that there was a Core Evaluation Meeting in June of '77?

A That's correct.

Q And as a result of that evaluation, I believe you said, no Educational Plan was, in fact, drafted?

A That's correct.

Q By the way, did you send or did someone from the school send a letter of no special needs to the parents?

A A letter of no special needs —

Q Right.

A — was not sent to the parents.

Q Okay.

Now, you also testified that there was a subsequent Core in March of 1978; is that correct?

A That's correct.

Q And in March of '78, as a result of that Core, there was, was there not, an Educational Plan?

A. That's correct.

Q Now — excuse me.

[114] MR. ROSENBERG: My associate is reminding me of what exhibit number this is.

Q Now, I'm referring to Parents' Exhibit 17, specifically Page 6.

Do you recall precisely, Mrs. Arin, what provision was specified in the plan for individual reading for Michael?

A Are you talking 1978-1979?

Q March '78 plan to March '79, yes.

A Kathryn Black was to see Michael five times a week.

Q Do you recall whether there was a specific amount of time that she was supposed to see Michael?

A I believe it was — I'd have to check.

50 minutes.

THE COURT: Five oh?

THE WITNESS: Five oh.

Q Mrs. Arin, I'm going to show you what I represent to the Court is the plan. Would you just make sure it is the plan in question?

A Yes.

Q And how much time is, in fact, reflected on the plan?

A One hour per day.

Q And what does it say, precisely?

A "Additional information: Reading, individual, one hour per day. Counseling: 30 minutes per week."

[115] Q And is it your testimony that during the period that this plan was in effect, Michael, in fact, received one hour of individual reading?

A Yes.

Q Okay.

Now, did I notice that you were referring to notes during your testimony?

A Yes.

Q May I see those notes?

A Certainly.

THE WITNESS: Is it all right?

MR. BERMAN: Certainly?

MR. ROSENBERG: Okay?

THE WITNESS: I was just asking my counsel if it was all right.

MR. BERMAN: Oh, certainly, by all means.

Q Did you prepare these notes?

A Yes, I did.

MR. ROSENBERG: Thank you very much.

We have no further questions. Thank you.

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[116] Redirect Examination by Mr. Berman

Q With respect to your decision to place Michael in Mr. McAleer's class, did you have the ultimate power to make that decision or did someone else have it?

A Someone else has the ultimate power.

Q Who has that power?

A Kevin Foley.

Q And did you ask him to approve your decision?

A Yes.

Q And did he do so?

A Yes.

Q Can you tell me why Mr. Cavanaugh was not at the June 4th meeting?

A He had the opportunity to share his assessment with Mr. and Mrs. Panico on May 25th.

Q And was his report shared, also, at the meeting with the other people there?

Was Mr. Cavanaugh's report shared at the meeting of June 4th?

A Yes.

Q Do you know whether or not Mr. and Mrs. Panico came to Mr. McAleer's class on June 2nd, 1979?

A I do know.

Q Did they?

[117] A No, they did not.

Q Can you tell me why a letter of no special needs was not sent in September of 1977?

A Yes. I sent a letter to the parents, Mr. and Mrs. Panico indicating to them, discussion held at the actual meeting in June of '77. And that was that they were going to hire a tutor, and they wanted to help Michael over the summer with the tutor.

At that time, I asked Bev Reber if she would be willing to meet with the tutor so there could be a continuity of services for Michael and exactly what Michael's reading needs were and share them with the tutor so they could continue in the same way for progress.

Also, Mr. and Mrs. Panico wanted to wait to make a decision for promotion or retention in the fall of that year. I told them that would be fine. There were no special needs that we saw

that would require an Educational Plan at that time. And perhaps remedial reading, whatever their decision was, for the second grade.

Q By the way, was Michael involved in Mr. McAleer's class in the 1979-1980 school year?

A I don't know that.

Q The 1979-1980 school year, whether Michael was enrolled, you don't know that?

[118] A Yes —

THE COURT: Is there any dispute about that?

A In 1979-'80, he was, I guess, on the mailing list for the Pine Glen School. I don't know.

Q Do you know if he was enrolled in that class in that year?

A No, he was not enrolled in that class.

Q And prior to that time, do you know whether the School System had ever agreed to his being enrolled in any other class?

A The School System had not agreed.

Q Had not agreed?

Thank you.

MR. BERMAN: No further questions.

THE COURT: Anything else, Mr. Rosenberg?

Recross-Examination by Mr. Rosenberg

Q Have you ever met Michael?

A Not directly, no.

MR. ROSENBERG: Thank you.

THE COURT: Thank you, Mrs. Arin.

[Transcript of a portion of the trial held on May 13, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes a portion of the testimony of Mr. John McAleer, Special Educator at the Pine Glen School, Burlington, Massachusetts, a witness called by the plaintiffs found at Transcript Volume I, pages 132-159, and reproduced in the Record Appendix, Volume II, pages 132-159.]

[132] JOHN McALEER, Sworn

Direct Examination by Mr. Berman

Q Please state your name, sir.

A John McAleer.

Q And where do you live?

A Medford.

THE REPORTER: Spell your last name, please.

THE WITNESS: M-c-A-l-e-e-r.

Q And what is your employment, sir?

A Special Educator for the Town of Burlington.

Q And how long have you held that employment?

A Eight years.

Q And will you tell me what your education is to become a Special Educator?

A I received my Bachelor's from Providence College. I received the Master's in Special Education from Boston College. My C.A.G.S, which is a Certified Advanced Graduate Study degree, is pending presently at Northeastern.

Q Have you taught in any other School Systems besides the Burlington System?

A No.

Q Now, calling your attention to the school year 1978-'79, what school did you teach at?

[133] A Pine Glen.

Q And the school year 1979-1980?

A The same. Pine Glen.

Q And —

THE COURT: I'm sorry. Pine Glen?

THE WITNESS: Pine Glen.

Q Where is your classroom located in the Pine Glen School?

A It's located on the second floor.

Q And calling your attention to the school year 1979-1980, did you have any assistance in your classroom?

A Yes, I did.

Q And what form does that assistance take?

A I had an Assistant Paraprofessional in the classroom part time.

Q And what was his or her name, please?

A Her name is Adrianne King.

THE REPORTER: Who?

THE WITNESS: King, K-i-n-g.

Q How many students did you have enrolled in your classroom in the 1979-1980 school year?

A Six.

Q And —

THE COURT: Does that mean there were only six students in your classroom throughout the day?

THE WITNESS: The total number I was servicing [134] was six.

The most that would ever be in that classroom at one time would be six children.

THE COURT: When a child was assigned to your classroom, did that child spend the entire day in your classroom?

THE WITNESS: Not necessarily, no.

THE COURT: Did any of them spend the entire day in your classroom?

THE WITNESS: A minimum number would. At the point of having six children, I would say one or two would spend 100 percent of their time with me. The majority would be integrated or mainstreamed into the regular classroom for whatever academic situation they could handle.

THE COURT: And then spent part of the time in your classroom?

THE WITNESS: And then come back to me at the appropriate times designated.

THE COURT: And what grades did you service?

THE WITNESS: At that time, the school was from first to fourth grade, and the children at that time, I believe, were between second grade to fourth grade of age.

THE COURT: The children that — the six, [135] all of the six children?

THE WITNESS: All of the six children were from either from the second, third, fourth grades.

THE COURT: Am I correct, that the total number of children that availed themselves of the services of the McAleer classroom were six, or that is the maximum number that was in your room at any one time?

THE WITNESS: At that time, at that year, I had six children on my roster. Okay?

At certain times, certain numbers of those six would be out of the classroom in the regulars.

THE COURT: I understand.

Q Mr. McAleer, was yours a classroom devoted to children who had Special Education needs?

A Yes.

Q What were these needs, please?

A The needs were basically those of both academic and somewhat social and behavioral. Academic, they were behind grade level. Social, ranged from a variety of situations.

Q And did you come up with a plan by which you could both teach these children and control their behavior while they were in the classroom?

A Yes.

Q Will you tell her Honor what your general plan was [136] for controlling behavior in your classroom?

A Okay. The classroom that I teach is a structured classroom where the room is broken up into different sections. Each section has a designated function. All of this is based on what is called the Behavioral Modifications System. So that when the child does perform adequately and appropriately, they are rewarded in the Chip System.

This Chip System provides a very formal — a highly structured environment whereby the children know what is expected of them, what happens when they do not meet the criteria, and what does happen when they do meet the criteria.

We have a group learning section to the room. We have an individual where everybody has their own desk. And we have a free time area, and we have a game area.

When the children do perform academically, they are rewarded in the Chip System, which means they have their individual contract. When they finish, they come to me or they raise their hand, whatever is appropriate at the time, and I immediately reinforce them by checking their work. If the work is appropriate they they receive a chip for that work. As the chips accumulate, what they can do with these chips is [137] if they want to take free time, we have stove timers and they take these chips and so many chips equal to free time. Okay?

So in the course of a morning, as reward, they get rewarded three ways: Initially by the chip, yes, I was good. Secondly, they also get rewarded by being able to take free time. And we have that game area set aside. Thirdly, at the end of the week, we keep a running score of how many chips they have accumulated and a certain number of chips equal a certain prize at the end of the week.

So what this does is to reinforce all along, on a weekly basis, what work they are doing, what behaviors they do exhibit, and they know immediately whether it has been acceptable or not.

THE COURT: Do I understand that you have three functional areas: The academic, the free time, and the games area?

THE WITNESS: Yes.

THE COURT: What does "free time" mean?

THE WITNESS: Free time means when they have accumulated the chips in the system that I have established, they are able to go into the free time area and get one of the appropriate designated games out, as a reward, to play.

[138] THE COURT: The games area is just a storage area —

THE WITNESS: It's just a section of the room — it's a section of the room where there are shelves and the games are on the shelf, and there's a play area in front of it.

THE COURT: So that they really, the children have two functions, they perform two sets of things in your room. They do academic work and if they are rewarded, they go to the free area and do games?

THE WITNESS: Well, as in any room, there's recess, and this is their form of recess. Yes.

THE COURT: No, I didn't understand. The games area is simply like a closet holding the games?

THE WITNESS: Well, not necessarily.

What happens in the room, it's sectioned off by dividers and chalk boards. Okay?

And there's one large area where we do the academics; another section behind a divider, where the game reinforcement type of area is; Reading — when I'm saying "games," at this point, I'm saying reading games, math games, language games.

In the back of the room, we have more dividers and behind cupboards and different things, there's a section of the room divided to give them an area to [139] spread out and play their games that are free time games. Monopoly, whatever the case may be.

THE COURT: So the games perform both as a teaching function and are used as part of the academic part of the classroom —

THE WITNESS: Correct.

THE COURT: — as well as being used during the free time or fun?

THE WITNESS: Free time. Correct.

THE COURT: Insofar as academic and fun are different.

Q Mr. McAleer —

A I — I'm sorry. Go ahead.

Q Mr. McAleer, at some time did you become aware of a child named Michael who was to be enrolled in your class in the 1979-1980 school year?

A Yes, I did.

Q Did you review an Individual Educational Plan that had been prepared for Michael?

A Yes, I did.

Q Did you review his full record?

A Yes, I did.

Q And based upon your review, did you come to a conclusion as to whether or not you could implement that plan?

A Yes, I did.

[140] Q And what was your conclusion?

A That I could implement the plan.

Q Now, I'm going to show you —

MR. BERMAN: I think Mrs. Arin — excuse me — has walked off with mine.

Q I'm going to show you the Individual Educational Plan that was devised for the 1979-1980 school year.

A Yes.

Q I'm going to ask you to look at the general and the specific objective of that plan, and then I'm going to ask you how you would have implemented each of these objectives.

THE COURT: The question is: How would you have implemented the objectives set forth in the Individual Educational Plan for that year?

MR. BERMAN: Yes.

MS. JANOS: Objection.

THE COURT: What's the objection?

MS. JANOS: The first objection is that without having specifically read that part, I would assume that all of this has been in the Administrative Hearing record and is before you.

And the second objection is I understood your pretrial order to be not what would have happened, but what he was —

[141] THE COURT: No. That was only with respect to what progress the child would have made. That's a different question.

I will allow this testimony.

MR. BERMAN: Thank you.

A Okay. The first general objective is for the child to obtain grade-level reading skills. That is No. 1.

Q Would you tell us how you would have implemented that objective?

A Under No. 1, there are eight specific areas dealing with the reading area.

How I would have implemented the academic reading skill area would be: Michael obviously had concerns in his ability to read and was behind grade level. My particular classroom uses what's called a Grush Reading Program.

THE COURT: Better spell that.

THE WITNESS: G-r-u-s-h.

A [Continuing.] The program is a phonetic program, phonetic meaning for every letter there was a sound. It's not a sight, it's a phonetic-based reading program.

What would happen in the case of Michael, yes, he was — had been afforded the opportunity to learn these sounds according to their symbols, but had not obtained the fluency.

[142] This reading program that I utilized would utilize the knowledge that he had at that time and then take it one step further and develop his fluency.

How that would happen would be using phoneme cards, templates and blocks, which would put words together, form words that he would have to sound out.

From that base, in the Grush program, you go into what's called word families. An example would be all words similar to lake, take, make, would be utilized. He would learn all in one set. So he would learn what's called a word family.

And we progress from there, and it is a hierarchy of progression, so that everything that he learned is a foundation in the step to what the next step would be.

The Grush Program has a ten-step level, learning style, where the first one being coated a red one. There are twelve initial consonants that the child has to learn, associated with six short vowels, blend them together, go to the next step, once that has been attained.

That would be attained by constant repetition, by constant practice of sounding out the cards, putting those cards together and blocks and sounding out words.

Thus, we not only learn this consonant sounds [143] but also learn fluency. After certain words have been established —

THE COURT: How do you do that? You just pronounce the sounds to the child and ask him what it is?

THE WITNESS: To teach a child an initial consonant involves a lot of steps. He sees the letter. Okay? Then you have to give him the sound. You can give him the sound verbally, as I would to you, as an individual. That is not enough. So with Michael, you would put it, also, on a tape. You would give him pictures.

He knows, he can identify the picture of it, but —

THE COURT: What do you do, give him just the one sound, and if you're talking about the M, for instance, you just say "mh"?

THE WITNESS: Right. Well, you would initially give him that sound. He would have to reproduce that sound himself. Okay?

So he knows what he's aiming for. You give him pictures, "mh," mitten, mailbox. He knows, he can identify those, he can say those words, but he cannot read those words. But what he is doing is identifying the first letter on each word. Okay?

[144] Then you write the word out for him and he sees, he associates the sound "mh" with the Letter M. Okay?

That's how you get the sound similar relationship and you build upon that.

How would you build upon that? You build upon it by working through workbooks, by using a tape recorder, on having words said with the initial consonant M, as you just pointed out, and having him repeat those.

The visual, the Helen Grush Program is a program which is called multicentering, which means to see, to hear it and to write it. The more senses taken into account, the more learning you understood, the more learning would become involved. It would help him more. He needed the visual and the auditory and written. If all three were involved, the ability to help him learn would be greater, and we build upon that. Once certain words were formed, then we put those words into sentence form on what he already knew, and build a fluency on that regard.

So, as a result, what we do, would be to raise his reading level as fast and as smoothly as we could, but always on the premise that what he knew before has been the foundation and that it has been [145] established and it works upon the other, and it's step progression.

The specific areas deal with a lot of these reinforcing activities to help in the fluency. They deal, a couple of them deal with being able to break a word into its syllable forms. Syllables are the parts of a word. If a child can know the rules

for syllabication, to divide the word, then when he sees a word, such as a two-syllable word, where Michael was at when he would have come to me, it would not have been threatening for him in order for him to break it into syllables. That's part of our reading. We do that automatically. Certain children do not. You have to teach them steps in order to see a word, break it into its parts and sound it out. That would have been another step.

Another one would be adding suffixes, which are the endings to words, again fluency. Prefixes, again adding fluency. And what you're doing all the time is he has a base knowledge of the word, such as "make," you add the ending "making," the fluency is increased. And then you build upon that.

Talks about reinforcing short vowels. All this time, you're not working in isolation. You're going back and reviewing. With these children, constant [146] review, constant practice is of utmost importance. So everyday review of what the knowledge has already been established is constantly reviewed so that he understands that all of this is put together. Things are not in isolation, which often happens with these children. They learn one isolated incident and then many times they can't relate it to the next step.

So what this program does is to constantly draw back on previous knowledge to build upon, so that they attain the fluency all along.

And then it goes on to talk about reading without hesitancy, fluency, in the regular classroom, and developing his sight word vocabulary.

It cites here a Dolch List. A Dolch List is for each grade level, they have established what is called by the man, Dolch, a Dolch List. And certain words —

THE COURT: Will you spell that for the Reporter, please?

THE WITNESS: D-o-l-c-h.

And certain words at each grade level, a child has to know. The English language is, unfortunate only 40 percent regular. And as a result, many words are irregulars. The word "the," the initial "th" is not like the initial "th" that we sound sometimes.

[147] A number of words, "us," "the," examples of first grade sight word vocabulary in the Dolch List that he'd have to know. And you just memorize. So what you do is you constantly practice and teach the child these words and build upon these, in relation to the Grush Program with the phonetic base program.

That, basically, would have been the reading program.

Q Would you proceed with the other objectives?

A No. 2, the general, is to apply mastered phonetic skills to reading.

THE REPORTER: Apply what, please?

THE WITNESS: Phonetic, p-h-o-n-e-t-i-c.

A [Continuing.] Basically, what I said before, of associating a sound to a letter.

The specifics on that would be, again, using the Helen Grush Program, basically what I have already stated.

To increase visual memory for sight vocabulary. Again, going back to the Helen Grush Program, word families are of the utmost importance here.

Children of this type not only sound out words, but use configuration of words.

THE COURT: Of what type?

THE WITNESS: Learning problems in reading [148] areas.

A [Continuing.] When they come, what they have to do is pick up tricks of the trade that ordinarily come to us. Configuration of a word is very important here. All words end "a-m," they know it's a short, but all the letters are low letters, and that kind of helps them in the mind.

THE COURT: What kind of letters?

THE WITNESS: Say all the words end in "a-m," ham, tam. Okay?

THE COURT: Beam?

THE WITNESS: Beam?

THE COURT: B-e-a-m.

THE WITNESS: No, that's not a — that doesn't fit.

THE COURT: It doesn't fit?

THE WITNESS: You're throwing in a double vowel and it doesn't help.

"a-m" is a specific configuration in this program. And that configuration adds — you just change the initial consonant. You change the initial consonant, they know the ending is the same, not only by sound but by configuration. A short "a" and a short "m", letterwise.

It's hard to explain, but as you see, certain [149] children, they learn configurations.

Building upon that, as well as word families, that also helps. We also spoke about, for sight, knowing the Dolch List. You just have to learn certain words in the English language because they are so irregular.

To continue to develop decoding and encoding. Encoding being spelling. Decoding being the reading.

Most children with reading —

THE COURT: Why does one call it encoding and decoding when all you're talking about is spelling and reading?

THE WITNESS: You have your language, we have ours. I don't know.

In order for the child to spell that has reading difficulties, most of them also have a spelling difficulty. This program not only helps a child to read, but to spell simultaneously. So every time he is reading the word, he's also seeing the word and he's writing. So he gets all three components in, and that's called multisensory, as I said before.

Constant reinforcement of the spelling to raise the spelling level.

The decoding is to break the words down into its parts, similar to phonetic skills. Changing [150] initial consonant letters, giving him all, as I said, "am" words, ham, give him one word, okay. The next word will be tam. What's the initial consonant? How did it change?

To develop all reading fluency. Most children with reading problems have fluency problems, not only because of the reading problem, but because of self-confidence. They've had failure, they don't like to read out loud. They don't like to read in the group situation. But it is a necessary skill in order for the teacher to realize if this child can read.

THE COURT: But are children in your classroom, the children that have the problems that you describe, are they able to express themselves articulately?

THE WITNESS: Most definitely.

Most of them have very high vocabulary. Most of them are aware of the situation, they are average intelligence or above, and they know that they are expressing difficulty in comparison to the children in the regular classroom.

THE COURT: Do they understand the meanings of the words they use?

THE WITNESS: When they speak to me?

THE COURT: Yes.

[151] THE WITNESS: Most definitely.

So we're not talking about any intellectual retardation or anything in that regard, if that's what you're asking.

THE COURT: No. I wasn't asking anything specific. I was just wondering, when you talk about teaching them ham, tam, slam, bam, or whatever, whether these children who apparently have trouble translating from a page into a spoken word, whether they can otherwise express themselves and understand, know and understand the words.

THE WITNESS: Most definitely.

And just to highlight, as we go over each word individually, a definition is given for each word. Such as a word such as "tam," is a difficult word for a child, because many people do not wear tams anymore. But we have pictures for them and we give a definition for that. Okay? It's a hat.

A [Continuing.] To increase auditory and visual sequential memory.

It's been stated before, there is a concern about memory, both in the auditory and visual. This would be done by giving the child — first, I would do it visually, where he would be given a sequence of three blocks. I put a card in front of it and [152] I could mix the blocks up. Be three different colors, a red, a blue and a yellow. He would have to come back and put the blocks into the sequential pattern that I did.

That would be, initially, to develop a memory pattern. All this being a foundation to work up to being able to express himself in a sentence, putting things in order, sequentially.

Continuing academic growth in subject areas spelling, math, written and oral.

Somebody already spoke about math, he seemed to approach grade level.

Initially, what I do with the child, such as Michael, would be to test him myself, even though testing was done, for my benefit so I know on an individual basis exactly where he stands, so that when it's time to integrate the child for whatever his strength is, Michael being math, I know what teacher to put him with, what skills he knew exactly, and what skills to reinforce to get him to grade level if he wasn't already at it before he was mixed.

To improve handwriting skills. We have a handwriting program in our school which is given two or three times a week.

And to improve understanding of directionality.

[153] This is done — usually it's not only on a —

THE COURT: What is directionality?

THE WITNESS: Directionality is two-fold.

First, left to right. Okay?

Also, being able to go in a reading series from the left-hand side to the right is how we read. Okay? From left to right.

THE COURT: When you talk about directionality you're talking not about writing but reading?

THE WITNESS: It could be both. In this particular instance, I'm talking about writing. From left to right. In writing, we also go from left to right. When you come to math, you go backwards, when you're adding. Okay? Which can cause problems, because we go from right to left when we're adding in a column. And this is where a lot of problems come about.

A [Continuing.] In reading, specifically, what you do is to work on left and right coordination. After that's developed you put things together, in order, and then you work so that when it's time to put words into sentences, he knows to go from left to right, into that sequence. It's just repetition and patterning all the time. Whereas that comes naturally to us, some of these children, it does not come naturally [154] to.

That is the ninth and final general set of goals.

Q Would you continue on to —

A There's another one?

Q — 10, 11, 12 and 13?

A Oh, I'm sorry.

"10. To increase self-confidence in the academic areas."

The area of self-confidence is one of the main emotional concerns in my classroom. Most of these children have not had success in the regular classroom situation. They've all had some academic problems. As a result, they come with low esteem, low self-confidence.

What I try to do, through the Behavior Modification System, through the initial constant reinforcement of the —

THE COURT: That is the Chips Program?

THE WITNESS: The Chips Program, exactly.

THE COURT: I think I understand that.

Do you have a bookkeeper?

THE WITNESS: I do.

[Laughter.]

THE WITNESS: You laugh. I do.

[155] We have two sets of books. One for the assistant and one for me.

A [Continuing.] To reinforce the self-confidence, it's an ongoing thing and it's done immediately. Once an assignment has been given to the child, we want to correct it immediately, give the child the reinforcement, if it was done appropriately.

Initially, obviously, I want to give high success situations so that the child does have success and happiness right away. Learning does not have to be threatening. Learning does not have to be failure.

As that goes on, we develop by increasing the difficulty as time goes on, but also maintaining the immediate reinforcement, the immediate attention to the child.

This usually increases the self-confidence the child has: Yes, I can do; yes, I can produce.

What we do, we first go from a one-to-one situation with each child to a small group situation, so that it's less threatening. When I say "small group," I mean two or three, into a larger group situation.

The whole goal of the program, to go from my classroom back into the regular classroom, to the full mainstream.

[156] So what I want to do, the emphasis would be individual, help the child learn, build his self-confidence, go into a small group, go into a large group and back into the regular classroom.

"11. To be able to express feelings."

Most of these children, as you expressed before, know what's going on. They can express themselves. Some of them

have feelings, but very much aware of why they're this way. So when — usually on a daily basis, we talk about it: How did you do? This was well done. Why is it good? They have to express to me why they think they received the chip.

Three afternoons a week, we have what we call behavioral activities. We sit around in what's called many times, the magic circle. And we talk about what we need improvement on. We talk about ourselves, we talk about others in the classroom. All with the intent of: Yes, I'm good. Yes, I'm getting to know myself in relation to others.

So we're going, again, from the individual to the small group. We reach out.

"12. To improve attention span and diminish distractability."

The vast majority have attention span problems in my classroom.

[157] What I usually go, again, is to work on an individual basis. I try and limit the initial lesson to a short span of time so that there is not enough time for them to be highly distracted.

Again, going back to the Grush Program, you use the visuals, the tactile and the auditory to get all senses involved so they are definitively looking at what they're doing, rather than just listening, because that means the eyes are going to be wandering. Get all three involved. The more involvement, the less likely a distraction.

You go from the individual, again, with tapes, with pictures, with writing, crayons, whatever the case may be, a variety of materials, to a small group situation, learning to work with others without being distracted, into a large group situation.

Of course, this is done over a span of time. With each child, it varies.

Diminished distractability. I spoke about the dividers in the room. That's why we have dividers in the room. The classroom is structured enough, set up, if you do something, you know what happens, you know that it's routine, you know the situa-

tion. The dividers allow children to focus in without having to see what's going on over here.

[158] We have carrels. Carrels are learning boxes set up in the classroom on some tables, where they come in and they sit down and there's no distraction, they're in this little cubicle, as such. So there is no visual stimuli involving them or distracting them.

Finally, "13. To develop positive, independent work habits for task completion."

This, again, all the children in our classroom have problems working independently. If you have problems learning, it's just understood you're going to have problems doing something yourself. You've had problems and — if you've had failure, you don't want to even attempt a situation by yourself.

When they come to me: I need help. I need help. I need help. That's all you hear. I can't do this.

It's always on the negative vein. What we try to do, again, through the discussions, the building-up of the self, once you increase the self, you also increase the availability of the child to say: Yes, I can try. Yes, I can do it.

We use all those things and the Behavior Modification Token System. I have one page for you, Michael. That's an instance. Initially, make it [159] very easy, knowing he can do most of the work. I gauge a time. Say the paper should take five minutes at the most, I give him ten. I have a stove timer. So I set the stove timer for ten minutes and say: When you come to me — or when you are done, either come to me, if I'm available, or raise your hand.

When he does, it's usually before the timer goes off. There, initially: Isn't that great? I did this. I did it on my own.

From thereon, you pattern, you shape, you work the child up, you keep doing that and maybe in a few weeks it's two pages and a little more time, but not nearly the double time that's necessary.

And that's how you work on increasing the independent skills.

Basically, that's all 13.

THE COURT: Thank you.

[Transcript of a portion of the trial held on May 14, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes the remainder of the testimony of Mr. John McAleer, a witness called by the plaintiffs, found at Transcript Volume II, pages 2-3 to 2-32, and reproduced in the Record Appendix, Volume II, pages 2-3 to 2-32.]

[2-3] JOHN McALEER, Resumed

Continued Direct Examination by Mr. Berman

THE COURT: You understand, Mr. McAleer, that you are still under oath?

THE WITNESS: I do.

THE COURT: Mr. Berman, are you going to be referring to the IEP, again, that the witness talked about yesterday?

MR. BERMAN: Through Dr. Kinsbourne, yes, I shall.

THE COURT: But not now?

MR. BERMAN: Not now.

Q Mr. McAleer, based upon your knowledge and experience, have you an opinion as to whether you could have successfully implemented the Individual Educational Plan for the 1979-1980 school year?

A Yes, I do.

Q What is your opinion?

A That I could implement the plan.

Q Could you explain the basis for your opinion, please?

A I feel that I could implement the plan, first of all, because of my formal training, the Master's in Special Education, and the background I have.

THE COURT: Excuse me a moment.

[2-4] When you talk about implementing the plan, precisely what do you mean? To achieve the objectives or to do what you yesterday outlined what you would do in order to achieve the objectives?

THE WITNESS: Basically, both. To put into practice what I stated yesterday, and to do it successfully.

A [Continuing.] With the education, as I said. Also, because of the experience that I have had with children with similar needs to what Michael had.

I've had children in the past who have gone through the Grush Program where I have met success in the reading areas and who have been mainstreamed back into the regular classroom with a great deal of success.

The vast majority of the children that come to me have been successfully mainstreamed, so that by the time they reach Middle School, most of them academically have been in the regular classrooms, which is the ultimate goal of the program that I am in.

The other areas would be time. Do I have the time to give to this child, which is proportionate to his needs? Yes, I do have that time. I say that because the whole basis for the program is a small [2-5] case load. At that time there were only six children, with an aide. That would give me enough time to individualize, to give him the one-to-one attention that he needed.

The other area for the opinion would be the materials available. I have been afforded a number of a wide variety of materials through Burlington that utilize a lot of individualization backup for any kind of disabilities, a wide range of different programs in the Grush Program, as I stated before.

Q Mr. McAleer, since you have been teaching this class at the Pine Glen School, has any child ever been taken out of the class without the consent of his parents?

A No.

THE COURT: What do you mean?

THE WITNESS: Any time there is a change in the Educational Plan, any time —

THE COURT: Oh, I see.

Q Mr. McAleer, there is evidence in this case that Michael needed to be taught in a highly structured classroom and that your classroom was not a highly structured classroom.

Have you an opinion as to whether you have a structured classroom?

A Yes, I do.

[2-6] Q And what is your opinion?

A That the classroom that I have is very structured.

Q And will you explain the basis for that opinion, sir?

A The basis for that opinion is, as I pointed out and documented yesterday, the token system which I have initiated, because of that system and the rules and expectations of the children are very explicit. Each child knows what the routine is, what the expectations are, not only for himself, but for every other child.

Every child has a definitive contract during each day, individualized, that they have to follow. When that contract has been completed, they get immediate reinforcement, both in praise, attention and with chips. As a result, the child knows in a sequentional manner what is expected of him, when the contract is to be completed, and what the ramifications are for completion or not completing. Everybody knows what's expected of not only themselves, but of the others.

Q Does it distract the other children of the classroom when one child gets up, assuming that child has achieved a contractual status in which he can do so and goes to the free time area, game area, or whatever?

A Not usually.

MR. BERMAN: No further questions.

[2-7] THE COURT: Mr. Rosenberg, do you have any questions?

MR. ROSENBERG: Yes, I do, your Honor.

Cross-Examination by Mr. Rosenberg

Q Mr. McAleer, as of the June 4th, 1979, Core Meeting, what was your understanding of the particular problem that Michael had?

A After the meeting?

Q Yes.

A My opinion was that the child was exhibiting problems in the reading area, he was behind grade level, and that there was some behavioral needs.

Q Did you have an opinion as to whether Michael was or was not dyslexic?

A That term did not come up until later on. And I did not define it or label it at that point.

Q Did you at some point in time form an opinion as to whether or not the child was dyslexic?

A I formed an opinion that the child had a reading problem.

Q I appreciate that.

Did you form an opinion as to whether or [2-8] not the child was dyslexic?

A I'm trying to avoid labels. I guess I would have to say yes.

Q Okay.

And what was your opinion?

A That the child was dyslexic.

THE COURT: What does that mean, Mr. McAleer?

THE WITNESS: Dyslexia is basically a deficiency in the reading area.

THE COURT: Of any particular kind or just any deficiency? That is, when you say the child has a reading problem, is that synonymous with saying the child has dyslexia?

THE WITNESS: No.

THE COURT: Then dyslexia is a particular form of a reading problem?

THE WITNESS: It's not — dyslexia is a problem of integration, either in the auditory or visual channels. In this particular child, it seemed to be a problem in the auditory channel.

Q Well, Mr. McAleer, isn't dyslexia a far broader term than just reading disability?

A It can be.

Q And isn't dyslexia, in fact, a term for a neurologically based problem in the area of visual perception?

[2-9] A Yes.

Q And aren't there ordinarily numerous — strike that question.

And a dyslexic child can have many manifestations of his or her dyslexia; is that not true?

A As with any problem, yes.

Q But it is true of a dyslexic child?

A It can be true.

Q As you understood Michael's problems, did Michael have other manifestations of dyslexia other than a reading problem?

A I can't answer that.

Q Do you know one way or the other?

A Not right now, no.

Q Well, did you know in June of 1979?

A Not to my recollection, no, I don't.

Q Well, I want to make sure I understand that.

Do you recall whether or not you knew in June of 1979 whether Michael's dyslexia had other manifestations in addition to a reading problem?

A It manifested itself in other areas, yes.

Q Now, what other ways? What other areas?

A Self-confidence, his self-image. That type of — the emotional areas, it would, most definitely.

Q Did it manifest itself in the area of spelling?

[2-10] A At the June 4th meeting, I couldn't tell you if that was true or not. I would assume so. I automatically assumed that.

Q Well, did you at any time — let me strike that question.

Do you know, as we sit here today, as I stand and you sit here today, whether or not in the period of the spring to the fall of 1979, Michael's dyslexia manifested itself in any way, other than in reading problems?

A Yes.

Q In what other ways?

A As I just stated, in the self-confidence, in the — that would be an off-shoot of the dyslexia, for the self-confidence area, the self-image.

If you're speaking directly to other areas, academically, at this point I would have to say it had to exhibit itself, but I couldn't possibly say definitively it would in other areas. I can't remember reading, specifically, spelling areas, let's say, that it did manifest itself. I could not say that.

Q You don't know one way or the other whether it manifested itself in the spelling area?

THE COURT: He just said that, Mr. Rosenberg.

Q Do you know whether it manifested itself in the [[2-11] mathematics area?

A He had a strength that was math. It might have in certain particulars, but not across the board, to my knowledge.

Q Did it manifest —

THE COURT: Mr. McAleer, if you do not know the answer to a question, please tell us rather than guessing as to what might be.

THE WITNESS: Okay.

Q Did it manifest itself in the area of his ability to do handwriting?

A Yes, it did.

Q Did it manifest itself in the ability to write a thought in a sentence as opposed to just the physical act of handwriting?

A I'd have to guess. I don't know.

Q You don't know?

A I did not see anything in print.

Q You did not see anything in the records, is that what you mean, which indicated that?

A I do not recall anything in the records, specifically, for that area.

Q Okay.

Did it manifest itself in the ability of the child to tell time?

[2-12] A I don't know.

Q Did it manifest itself in the ability of the child to know left from right?

A Yes, it did.

Q Okay.

Was he incapable of differentiating between left and right?

A I can't say that he was incapable. He had difficulty. I can't say that he was incapable of it.

Q Okay.

Did it manifest itself in the ability of the child to differentiate between up and down?

A I can't answer that, no.

Q Was Michael functionally an illiterate at the point at which he was going to enter your class?

A Functionally illiterate?

Q That's right.

A Not to my knowledge, no.

Q He could read, in other words?

A Yes, he could.

Q Okay.

Do you know what his — what is the term "sight vocabulary" mean?

A Sight vocabulary —

THE COURT: What was the term again?

[2-13] MR. ROSENBERG: Sight vocabulary.

A Sight vocabulary refers to any words that have to be learned out of context with other phonetic sounds. They're just words that are words that do not follow the phonetic patterns and just usually have to be memorized.

Q Would the word "the" be an example?

A It could be, because it does not have the breath "t-h" sound.

Q Okay.

So you simply have to learn that, you cannot sound that out; is that what a sight word is?

A It's not the best example, but it could be, yes.

Q Well, would you give me an example that is a more precise example?

A "What" could be an example.

Q Okay.

Now, did Michael, to your knowledge, have a sight vocabulary of any number of words as of June of 1979?

MR. BERMAN: Objection.

A I couldn't tell you what it is.

Q You couldn't.

MR. ROSENBERG: I'm going to refer to the Educational Plan, your Honor.

[2-14] THE COURT: Well, if you're going to do that, let me see if I can find it.

MR. ROSENBERG: All right.

THE COURT: If you wanted to, you could help me find it.

MR. ROSENBERG: It's Parents' Exhibit 41.

Now, I'll be happy to search.

[Pause.]

THE COURT: Now, which part of this are you referring to?

MR. ROSENBERG: Your Honor, there's a section called "Addition to Individual Plan" that comes, actually after the signature page. I believe it's the 10th page. There are little

numbers down in the right-hand corner. And it says "Performance level."

THE COURT: Yes.

Q Mr. McAleer, the performance level that is being described as you understand it, was what?

Is that the performance level for Michael?

A As I understand it, yes.

Q And it's as of the time the plan was prepared?

A I presume so.

Q Okay.

So is my understanding correct that according to the plan, Michael had what is called 200 — what [2-15] you mean, his sight vocabulary is 200 words?

A That's what it says here.

Q Okay.

Do you have any reason to suspect that's not true?

A No.

Q By the way, a little further down there, there is a sentence that begins, "Michael is able to skim reading passages to locate details and overview idea."

Would you take a moment to read that again, please, to yourself?

[Witness complies.]

A Okay.

Q Is that quality consistent with a dyslexic child?

A It can be, depending upon the fluency of it.

Q So some dyslexic children would be able to skim a passage in the manner described there?

A Depending on how it is, yes.

Q Depending on how what is?

A How long the passage is; how prominent the idea is. It can vary, depending upon the involvement of the passage.

Q In skimming a passage, do you read every word?

A You're not supposed to, no.

Q What do you mean by the term, "skimming a passage"?
[2-16] A It means picking out the main ideas in the paragraph or whatever, you know, the passage is.

Q Does your ability to skim a passage depend on how many sight words you have?

MR. BERMAN: Objection to the form of the question?

THE COURT: No, I'll allow it.

A It can, yes.

Q Well, in what way does it not depend upon how many sight words you have at your command?

THE COURT: Mr. Rosenberg, aren't we going a little beyond the direct of this witness insofar as, aren't we now turning him into an expert on what dyslexia means?

MR. ROSENBERG: Well, your Honor, let me just think for a moment before I respond.

He has testified at some length, both today and at the Administrative Hearing, of why he is capable of implementing the plan. And it seems to me, I have not only the right but an obligation to make sure that he understands what is contained in that plan, including the description of the child's level of performance.

THE COURT: Okay.

MR. ROSENBERG: Would you please read the [2-17] question back to the witness?

THE COURT: Can you remember it?

MR. ROSENBERG: Let me see if I can.

Q In what — yes, I think I can.

Do you remember the question?

A You can try it.

Q I can try. All right.

In what way does skimming a passage for a dyslexic child not depend upon his ability to have a volume of sight words, a vocabulary of sight words?

A Well, if you're referring to his ability not to be able to read, what it does, it allows him to skip over those words, basically.

Q He skips over. . .

A When you're skimming.

Q When you're skimming, what words do you skip over?

A You're referring to what he is not able to do, it affords him the opportunity to skip over those words.

Q So, in other words, am I not correct, that in order to skim a passage, a dyslexic child only can rely on sight words?

A He should, if he's good at it.

Q Should he predominately rely on sight words?

A Well, if you're referring to — what I'm trying to say is that after a while, all words become sight [2-18] words to a good reader. So after a while, if he can recognize certain what we call phonetic words, those soon become sight words.

Q But at the point in question that's covered by this plan —

A Yes.

Q — according to the School's record, Michael had a sight vocabulary of 200 words.

It also says that he's able to skim passages, or words to that effect.

A Yes.

Q What I want to know is, in his skimming of passages, would he do that skimming solely by using the sight words or would he use some other technique to skim a passage?

A Oh, he'd use both techniques.

Q Both techniques?

A Sure.

Q He'd use a phonetic approach, as well?

A He would have to.

Q This is in skimming a passage, he would use a phonetic technique?

A For a child — for a child like Michael, he would have to.

Q And your testimony, so I'm clear on it, is that [2-19] skimming is something that a dyslexic child can do?

A I don't say that, no. I do not say that.

Q Well, do you say that a dyslexic —

A You're saying —

Q I'm sorry.

A — can Michael do that? Obviously, he can, from what was written there. I did not say that.

Q Can a dyslexic child skim a paragraph?

MR. BERMAN: Your Honor, I think this is about the third time that question has been put to the witness.

MR. ROSENBERG: If I have asked it before, I will withdraw the qustion.

Q Now, so I'm clear, were there going to be six children in addition to Michael, had he chosen to enroll in your class?

A Correct.

Q Now, as you have described Michael's problems, okay, how many other of those six children had Michael's problems?

A Specifically in the reading area —

Q Okay.

A — to that date, there were three children with similar problems.

Q Three out of the six?

[2-20] A No. Three out of — in the course of — when I teach, the average stay is two to three years in my classroom for the child, not full time. They are mainstreamed. So over the course of those five years, I had, I thought of this before, I think it was nineteen children over the course of the five years.

Over the course of the five years, nineteen children, three had been similar to Michael's needs.

Q Okay.

You've anticipated a whole different line of questioning, Mr. McAleer. Now, would you focus on the question I tried to ask? Maybe it wasn't clear.

Out of the six children who were, in fact, going to be in Michael's class, that particular year.

A Okay.

Q Okay?

How many of those children had problems similar to Michael's?

A I definitively can remember one at that point.

Q Okay.

Now that was — do you know how old — strike the question.

Do you know old Michael was at the time he was entering or supposed to enter your class?

A Well, he was going into fourth grade. That would have [2-21] made him possibly nine or ten.

Q Okay.

Now, how old was the other child who had Michael's problems?

A At that time, seven or eight.

Q Well, do you know whether it was seven or eight, Mr. McAleer?

A I don't.

Q Did that child, as far as you know, read at a level higher than Michael?

A You're going back five years. At this point in time, I could not tell you. I don't remember.

Q Well, let's be clear. I'm not going back five years. I'm going back three years.

A Well, three years.

Q You don't remember?

A I don't. I really couldn't tell you.

Q Was that child dyslexic?

A I don't use the term dyslexia. That term was never used in any of his writings, no.

Q As far as you know, he was not?

A The needs were similar, performance needs were similar.

Q Did that child have problems spelling?

A Yes, he did.

Q Did that child tell time?

[2-22] A At that point in time, I can't — I don't remember.

Most children at that age do have problems in telling time, seven or eight, when they come to me.

Q Now, did Michael need a significant amount of individual attention?

A I would say, as with all the kids in my class, when they first come, they certainly do.

Q And from your review of the record, did Michael need some individualized attention?

A Yes, he did.

Q During the previous academic year, that is, '78-'79, did Michael receive individualized help with his reading?

A Yes, he did.

Q Do you know how much he was receiving in the way of individualized help?

THE COURT: When was this, Mr. Rosenberg?

MR. ROSENBERG: During the year 1978 and ending '79 when the Core Evaluation and the Individual Educational Plan was drafted.

MR. BERMAN: I object to this question.

THE COURT: What's the objection.

MR. BERMAN: This man, by all the evidence, had nothing to do with him in '78-'79. Anything he would possibly speak about would be pure hearsay — [2-23] not hearsay in a technical sense, but it would be based upon what other people told him.

MR. ROSENBERG: I have several responses to that.

No. 1, the question is: Does he know?

If he does not know, we'll find that out.

THE COURT: You may tell us whether you know.

A Yes, I do.

Q Okay.

And how much individualized reading was Michael supposed to have received during the year '78-'79?

THE COURT: How did you know what you know, Mr. McAleer?

THE WITNESS: Jean Arin answered that question yesterday.

Q Well, let me ask you this —

MR. ROSENBERG: I will withdraw the last question, but I'm going to pursue this in a slightly different way, with your Honor's permission.

Q Were you at the Core Evaluation Meeting on June 4th?

A Yes, I was.

Q Okay.

Do you recall, at that time, being told that [2-24] Michael, in fact, received an hour's individualized reading?

A I presume I was. But I couldn't tell you definitively.

Q Have you ever seen that fact in the records?

A Yes.

Q Now, you have already testified, have you not, in the Administrative Hearing, that in your class, Michael would receive 15 minutes to 20 minutes individualized reading help?

A One-to-one. It's individualized there.

Q That's right.

A But that's not just individualized.

Q Well, now, let's be clear on this.

A Okay.

Q Is the answer to my question, which is: You testified at the Administrative Hearing that Michael would receive 15 to 20 minutes of individualized reading help, and accurate statement?

A Not to my definition of individualized.

Q Okay.

So you do not recall testifying to that at the Administrative Hearing?

A I remember stating that when I — she asked the question, to my knowledge, how long would it be that I worked specifically on an individual basis, one-to-one, with [2-25] Michael, having had six kids at the time and dividing my time of two hours a day reading, I would have had to say 15 to 20 per child, he would get just me.

Q Okay.

So you would provide him with 15 to 20 minutes individualized reading help? Just you?

A Just me.

Q Is that correct?

A For that definition, yes. There's more to individualization after that.

Q I understand.

The more to individualization in Michael's case, would that have been reading in a group setting?

A You meant —

MR. BERMAN: I don't think I understand the first two words, "more to." I would appreciate having the question rephrased or repeated.

THE COURT: I understood the witness to say there was more to individualization than the one-to-one, 15 to 20 minute reading. And I understood Mr. Rosenberg to inquire what he meant by that.

MR. BERMAN: Thank you.

MR. ROSENBERG: I think that's phrased preferably to the way I phrased it. Thank you, Mr. Berman.

[2-26] A The added dimension of individualization would be meeting directly his reading needs by specifically gearing the reading program to exactly what Michael needed. If that happened to be with another child at the time, that's what it would have been. If that meant working with another child in a specific lesson on a specific skill, because that's what he needed at the time, yes, that would have been individualization.

Developing independent material for him to work on to see how well he did learn, that would be individualization.

Q Now, the only other child who had Michael's reading problems, as you've just testified, was somebody who you at this point don't recall whether he was seven or eight? Is that correct?

A That's correct.

Q That's the other child, is it not, who would read with Michael, I take it, if you were doing it in a group or more than one-to-one basis?

A Possibly.

Q Do I take it — do I infer from the last word, "possibly," that some of the other children in the class would do group reading with Michael?

A Well, eventually that's the goal, of course.

[2-27] I'm not saying initially, but I'm saying eventually the goal is to get Michael to read and to be mainstreamed. And, of course, you want the child reading in a group situation.

Q But at the point in which he entered his class — excuse me, your class, and prior to his making the desired improvement, the only other child he would read with was this one other child?

A It's all speculation. I would say, possibly, yes; only because I don't know how his reading per se — I never read with Michael. And until I read with Michael, could I have said that definitively.

Q But notwithstanding the fact that you don't know what's definitively wrong with Michael, you could have implemented the plan?

THE COURT: He didn't say that.

A I didn't say that.

Q Perhaps —

A You were asking the question: Who would he read with?

THE COURT: Mr. McAleer, there's no question.

MR. ROSENBERG: There's no question.

May I ask the Court Reporter to read back what he did say?

THE COURT: No.

Well, you may ask, but your request would be [2-28] denied.

MR. ROSENBERG: The request will be denied.

All right.

Q Was Michael going to receive individual, one-to-one help from you in the area of spelling?

A They all do.

Q How about forming sentences, forming paragraphs and writing? Would he have received individual help on a one-to-one basis from you in that, as well?

A Definitely.

THE COURT: This is separate and apart from the one-to-one reading that you previously testified to?

THE WITNESS: Usually, when we get to that stage, that is language arts, which is another 45-minute period, later on. So that would be in addition to the reading, correct. It would be a separate time.

THE COURT: What would you anticipate to have been the total time in the course of an average day that you would have spent with Michael on a one-to-one basis? As you defined it when you talk about the 15 to 20 minutes?

THE WITNESS: The average day for Michael, just me — I'm trying to calculate each activity and how much he could have gotten by himself — I would [2-29] approximately an hour he would have gotten.

THE COURT: And that would have included, as we now know, 15 to 20 minutes on reading?

THE WITNESS: Yes.

THE COURT: And how would the remaining 40 to 45 minutes have been spent?

THE WITNESS: Okay. Five to ten minutes in spelling. In the math area, another 15 minutes. The language arts, five to 10 minutes.

THE COURT: Language arts is what?

THE WITNESS: Language arts is writing; could be penmanship; forming sentences; parts of speech, nouns, verbs, adjectives; that type of thing, basically.

The afternoon, we have social studies, another few minutes there; and, also, the behavioral activities where I would be talking just to him for another period of 10 to 15 minutes.

Q Were the children taught social studies in your class?

A Yes.

Q Would that be done on an individualized basis with Michael or in a group?

A Initially, it's done in a group. And then we individualize according to the child's needs — or not necessarily needs, but his strengths.

Q How about math? Would he be taught in an individual [2-30] setting and a group setting or just an individual or just a group?

A Initially, it would have been an individual group.

Q Excuse me?

A Initially, it would have been an individual, individual group in a — it would have been one-to-one. It would have been just him, so I can ascertain what his strengths were.

Q Okay.

Were the materials that you used in that class —

A The math class?

Q — specifically designed for dyslexic children?

A I tend to doubt it.

Q Were you going to use materials — strike that question.

For teaching social studies, were you going to use written texts of any sort?

A No, I do not.

Q Now, I believe you testified you were trained in something called the Helen Grush Method; is that correct?

A Right.

Q There is another method that has been referred to throughout the Administrative Hearing known as the Orton-Gillingham Method.

[2-31] Is the Helen Grush Method the same as or different from the Orton-Gillingham Method?

A It's similar to it.

Q It's similar to it.

And is it, in fact, a derivative of the Orton-Gillingham Method?

A I don't know.

Q Do you know which one was developed first?

A I don't know.

Q You don't know. Okay.

In the five years preceding the fall of 1979, do I understand that you had a total of 19 children in your classes?

A I'm trying to think back. I think that over those years, yes, the number of children I dealt with would have been 19.

Q Do you know how many of those children were diagnosed as having — excuse me, as being dyslexic?

A I already answered. Similar problems to Michael, there were three.

Q There were three. Okay.

You'd never met Michael prior to September of 1979, had you?

A He walked in during the Core Meeting on June 4th.

Q Other than that one meeting, you never met him?

[2-32] A No.

MR. ROSENBERG: I have no further questions, your Honor.

THE COURT: Mr. Berman, anything else?

MR. BERMAN: None, your Honor.

THE COURT: Thank you, Mr. McAleer, you're excused.

[Transcript of a portion of the trial held on May 14, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes the testimony of Dr. Marcel Kinsbourne, an expert witness called by the plaintiffs, found at Transcript Volume II, pages 2-33 to 2-108, and reproduced in the Record Appendix, Volume II, pages 2-33 to 2-108.]

[2-33] MARCEL KINSBOURNE, Sworn

Direct Examination by Mr. Berman

Please state your name, sir.

A Marcel Kinsbourne.

THE COURT: Marcel?

THE WITNESS: M-a-r-c-e-l K-i-n-s-b-o-u-r-n-e.

Q And where do you live, sir?

A Winchester, Massachusetts.

Q And what is your profession, sir?

A I'm a physician.

Q And do you have any specialization, sir?

A I do.

Q And what are these, please?

A I'm a child neurologist. And my further specialization is in the area learning disabilities. . .

THE COURT: Dr. Kinsbourne, I have trouble hearing you. Could you keep your voice up, please?

THE WITNESS: Yes.

THE COURT: What was the first speciality?

THE WITNESS: I'm a child neurologist. In other words, a pediatric neurologist. And my speciality within that field is learning disabilities and attentional difficulties.

[2-34] MR. BERMAN: You might be better heard, Dr. Kinsbourne, if you move the chair forward.

THE COURT: I'm sorry, it doesn't work terribly well, so you'll have to just shout.

MR. ROSENBERG: Could I have the last answer? I simply didn't hear it.

THE WITNESS: Learning disabilities and attention difficulties.

MR. ROSENBERG: Thank you.

Q Would you tell her Honor what your educational background is, Dr. Kinsbourne?

A I went to college in England at Oxford University, and my college there was Christ Church.

I took my B.A. in Physiology in 1952.

I then won a combined hospital scholarship which took me to Guys Hospital in London for my clinical training, which I completed in 1955.

I took training for periods of time in Internal Medicine and Surgery and Neurosurgery and then specialized in Pediatrics.

In 1958, I won a Fullbright Award, which took me to Bellevue Hospital in New York for a year of Pediatrics.

I returned to England and trained both in Pediatrics at the Great Ormond State Hospital.

[2-35] THE REPORTER: At where, please?

THE WITNESS: Great Ormond, O-r-m-o-n-d, State Hospital, and at the National Hospital at Queen's Square, and then at the Oxford University Medical School in Neurology and Pediatric Neurology.

In 1964, I had, in addition, accumulated some experience in publications in the field of Psychology, particularly as it bears on the relationship between behavior and brain functioning, both in the mature and the developing brain. And I was awarded a higher doctorate by the Faculty of Medicine at Oxford University for disortation in that field.

In 1964, I was appointed University Lecturer in Psychology at Oxford University. And I retained that position until 1967, when I moved to the United States.

I moved to Duke University in North Carolina, and there my title was Associate Professor of Neurology & Pediatrics. And my responsibility there, among others, was to be Director of the Developmental Evaluation Clinic, which is a clinic dealing with developmental disabilities.

In 1974, I moved to Toronto, where I was Professor of Pediatrics in the Division of Neurology at the University of Toronto, and also Professor [2-36] of Psychology at the University of Toronto and at the University of Waterloo.

THE REPORTER: The University of what, please?

THE WITNESS: Waterloo.

And there I ran the Learning Disabilities Clinic at the Hospital for Sick Children.

In 1980, I moved —

MR. BERMAN: Excuse me.

I'm sorry, your Honor. Both Mr. Rosenberg and I cannot hear Dr. Kinsbourne.

Dr. Kinsbourne, could you please speak louder?

THE WITNESS: I'm sorry.

Should I repeat some of what I said?

MR. BERMAN: No. No.

MR. ROSENBERG: No, I'm reading as you go along.

MR. BERMAN: But please try to keep your voice up.

THE COURT: Do we have a curriculum vitae either in evidence already or to be offered?

MR. BERMAN: We have a curriculum vitae that has been given to — as answers to interrogatories to Mr. Rosenberg.

THE COURT: Can we mark it as an exhibit in this case?

[2-37] MR. BERMAN: Yes, your Honor, I'll be glad to.

THE COURT: Why don't we mark all of the transcript of the Administrative Proceeding Exhibit 1, and all of the exhibits collectively at the Administrative Proceeding, Exhibit 2 in this proceeding, and we will mark the curriculum vitae as Exhibit 3.

MR. BERMAN: All right.

I have the problem, of course, with this case, as your Honor realizes, of the accumulation of paper. I read — I found Dr. Kinsbourne's curriculum vitae and read it over when I was preparing this case —

THE COURT: We'll mark it when you find it.

MR. BERMAN: All right.

MR. ROSENBERG: I think perhaps that Ms. Janos has a copy.

[Administrative Hearing transcript marked Plaintiffs' Exhibit No. 1 in evidence.]

[Administrative Hearing exhibits, collectively, marked Plaintiffs' Exhibit No. 2 in evidence.]

[Curriculum Vitae of Marcel Kinsbourne marked Plaintiffs' Exhibit No. 3 in evidence.]

Q I assume — I was going to go into the publications, but I see these are — there are voluminous ones. [2-38] I think there are over a hundred, as a recall, in the curriculum vitae.

I would simply ask you whether you have published any books in the area of learning disabilities specifically?

A The most recent of my five books is entitled "Children's Learning & Attention Problems" by Little, Brown in 1979, specifically in that area.

Q And have you published any other books or papers on learning disabilities?

A I have published four books relevant to the field. And of my over 200 papers, the majority are relevant in one way or another.

Q Now, Dr. Kinsbourne, were you at some point asked to undertake, to give some opinions with respect to Michael?

A I was.

Q And when was this, please?

A This was in the late fall or early winter of 1980.

Q And by whom were you asked?

A By you.

Q And, specifically, what were you asked to do?

A You asked me to review the issues relative to Michael with respect to the adequacy of the Educational Plan for 1979-1980, as well as the school's ability to [2-39] implement it and its restrictive nature.

Q And will you please tell her Honor what you did in order to form opinions?

A I first read the compendium of documents compiled by the Burlington School System. And I read the transcript of the Hearing that had taken place and the findings of the Hearing Officer.

I visited the Burlington Central School, where I met with several teachers who had knowledge of Michael, including Mr. Foley, Mrs. Arin. I talked to Gail Marsh. I also met Mr. Cavanaugh, the Psychologist. And discussed with each of them the issues relevant to the question that you asked me.

And I then visited the Pine Glen School. I reviewed the physical location of the classroom where Michael would have been taught and it's relation to other classrooms where he would have been mainstreamed and, also, it's relation to classrooms where children with other disabilities were located.

I observed Mr. McAleer teach, and I then discussed with him his teaching methods and what he would have done, specifically, with Michael. I also observed an art class to which Michael would have been mainstreamed.

Subsequent to this, I reviewed documents [2-40] from the Carroll School that you gave me. I was present when the deposition was taken of Ms. Robin Fleck of the Carroll School and I then read through the transcript of that deposition.

I asked for a copy of the Helen Grush Methodology, which I was not familiar with, and reviewed that. And I also reviewed Dr. Melvin Levine's report of last June. I referred to other literature and thought about it.

Q Have you formed an opinion as to whether or not the Individual Educational Plan prepared by the Burlington Public Schools for Michael for the 1979-1980 school year adequately addressed his needs?

A Yes.

Q Have you formed an opinion as to whether or not the Town was capable of implementing that plan successfully?

A Yes.

Q Have you formed an opinion as to whether or not it would have been the least restrictive setting in which it could be implemented?

A Yes.

Q Now, will you tell me what your opinion was with respect to the Individual Educational Plan?

A I thought that the plan did adequately meet Michael's needs.

[2-41] Q And will you tell me what your opinion was as to whether the Town could successfully implement the plan?

A I thought the Town could.

Q And would you tell me what your opinion was as to whether or not the implementation would have been in the least restrictive setting?

A Of the alternatives available, it seemed to me the least restrictive.

Q Now, will you please tell her Honor the bases for the opinions that you have just given?

A I will first address the adequacy of the plan.

I judge it to be adequate because it addresses what I take to be the two main issues in Michael's education at that time.

One issue was his difficulty in paying and maintaining attention. The other issue is difficulty in achieving fluency in reading.

Now, these were not the only difficulties but they were, in my view, the most important by far.

Now, in order to explain why I felt that, and do feel, that the provisions made or proposed were appropriate, I would have to go into and will go into the diagnosis of Michael's case, because from the diagnostic label, flow the measures that are taken to help the child.

[2-42] And, here, some terminology needs to be explained.

When children do badly in school, the reasons can be either intrinsic or extrinsic to their own development. Extrinsic reasons would be poverty, deprivation, child neglect, other stresses which cause emotional disorder. Intrinsic would be delays and failures of mental development.

Now, the first question to be asked of any child such as Michael is: Is the difficulty that he's experiencing extrinsic, environmental, stress related, emotionally related, or has it to do with the way his own intellect has developed, with the strengths and weaknesses that he, as an individual has for whatever reason.

Now, that first determination, on the record, seemed very easy to make. There was no indication anywhere, nor has anybody expressed the opinion that there was a primary emotional disorder in Michael's case. They had, of course, recognized Michael was upset. He was described as depressed, lacking self-confidence, anxious. And all of these being natural reactions secondary to the learning problem.

THE COURT: When you say no primary emotional disorder, you're saying that there was no intrinsic problem.

[2-43] THE WITNESS: Well, I was using the term intrinsic rather differently, in terms of brain based.

What I'm saying is the child didn't have a chronic anxiety state due to some early childhood trauma. It was not, in fact, a psychiatric case. But he was upset. And, therefore, he did have emotional needs, secondary to his predicament.

Now, that important distinction is relevant to the educational provisions made. If a child has a primary emotional disorder, then the classroom provisions have to address that. Of course, they cannot by themselves address it. Such a child would have intensive psychotherapy or other psychiatric treatment. In the meantime, while these hopefully work, the child's socialization, relations to others, would be the main concern in a classroom. His achievement would be a secondary concern. Although the format would be a learning format, the goals would not be the primary educational goals.

On the other hand, as I scrutinized the Educational Plan offered, I find that the goals are virtually in every case educational goals.

In other words, this is not the kind of IEP which would be written for a child with a primary emotional disorder. Of the thirteen points, two address his feelings, and do so appropriately. Self-confidence.

[2-44] The other — two of them address the attentional issues, and the other eleven address specific educational goals.

So I will now concentrate upon the different types of what I call intrinsic or brain based difficulties that may lead children to have difficulty learning to read and write.

They fall, again, into two categories.

In order to achieve anything educationally, obviously one has to understand the material and remember it. And, in fact, remembering flows from understanding. Because what is not understood will rarely be remembered.

THE COURT: I'm sorry. Start again, please.

THE WITNESS: A basic need, intellectual need to learn, clearly is to understand the material. And one cannot remember material unless it is understood.

And there are some children who are slow learners because the brain development, which is the underpinning of intellect, is slow; and these would be retarded children. That is not the issue here.

However, there are some children who although they are developing normally in most facets of intellect, for reasons that are not clear, are [2-45] developing very slowly, if at all, in certain facets. Limited areas of intellect. So they will find things hard to understand in one area, although in other areas they are as bright and quick as anyone else.

When that area of selective difficulty overlaps an academic field and thereby impairs academic performance, we call that a learning disability.

When the particular academic field is reading and writing, we call it a reading disability. So that is one kind of problem.

The other kind of problem comes first. Because, however well one is able to potentially understand anything, if one is not paying attention, one will not understand.

If a child cannot pay attention, or although beginning to pay attention, cannot sustain attention, or divides his attention between the issues and irrelevances, that child will learn slowly, particularly matters that require concentration, repetition, rehearsal, and prolonged thought.

So an attention deficit would be superimposed overlie and even mask, the other kind of problem, which I call processing problem.

THE REPORTER: What kind of problem?

THE WITNESS: Processing.

[2-46] And when a child has a substantial attentional problem, it often is very hard to determine whether underneath that, there also is a problem of comprehension because the test results can be ambiguous.

Now, if a child has a purely comprehension, processing type of problem, that child's needs are rigorously educational,

rehearsal, drill. He finds it harder, therefore, he has to spend more time doing it. Because his needs are individual, the attention would have to be individual. And then a rigorous methodology can be instituted. Whether it is fun or meaningful, even is secondary, the child is usually quite motivated to succeed.

However, when a child has an attentional problem, that kind of method is not satisfactory. Because the children with attentional problems who, incidentally, in terms of the medical amentia are nowadays called attention deficit disorder, or ADD, and in the past been called hyperactive.

Those children do not do well in monotonous circumstances. And although they wish to succeed, their motivation flags very soon unless there's something exciting going on, and something that they can intervene and activate.

So whereas a child with a limited reading [2-47] disability, which some call dyslexia, although for reasons I will state, I do not, I reject that term, can be given work to do, and will do that work, and will work independently and then will come back for more.

A child with an attention deficit disorder will find great difficulty working independently, will demand attention all the time, will keep coming back for more direct assistance, and may get locked into an interaction with the teacher, which is never ending. Where the child achieves while the teacher is there and then falls apart as soon as the teacher leaves.

So a major objective with those children is to help them not just perform, but perform independently, perform without constant support, and ultimately perform even though distracting things or people are present.

Now, in the case of Michael, the problems with his attention pervade the record. There is no observer who has not remarked on his attentional difficulty in some form of words or other. The comments are in school reports from the Burlington Schools, from the Memorial School. The record from

the Carroll School is riddled with comments about Michael's attentional difficulties. Every tester, every [2-48] specialist who has given Michael any tests, has commented in some way that Michael has trouble with attention. So have the physicians, so have the psychologist who tested his personality and emotional reactions.

The kind of words used range from "fail to pay attention," "cannot sustain attention," "mind drifts away," "doesn't maintain eye contact," "won't complete tasks," "vocalizes."

THE COURT: Is this attention deficit disorder a neurological defect?

THE WITNESS: Yes. In the sense it is brain based. It has to do with a failure of certain brain systems to develop to an adequate extent. So it's constitutional is a good way of putting it.

So, again and again, we are reminded by the record that Michael's attention tends to lapse very fast. He slips away from the task, has to be constantly brought back.

And when a child is like that, two things have to be realized: a child with attention deficit disorder, first of all, is not always the same. It doesn't mean he can never pay attention. He can, but he doesn't very often. Specifically, he will pay attention where he really is motivated, what's happening is to him dramatic and very interesting. [2-49] It is just that continually his attention lapses.

So instances can be found where he attends. But they will be very infrequent and, for practical purposes, not frequent enough.

The second point is that no one example of that behavior is diagnostic. But we look for a pattern of behavior. And in that pattern, we have other manifestations, both in the classroom and in the home. It isn't just a school problem. It is a problem of living style.

First of all, a person who has an attention problem would also be described as impulsive and hasty. Because the fact that

they stop attending is seen by others as being impulsive in making their decisions, giving their answers; and hasty because they haven't taken their time. And it is remarked of Michael that he is impulsive and hasty, even in preschool this is said, in kindergarten, that he already showed this style.

Furthermore, a person who doesn't pay attention is going to be disruptive. He will break the guidelines and the ground rules of a structured situation. He will do things that are not called for. He will attract adverse attention for behavioral reasons.

[2-50] And, again, the record had many references to Michael as a behavioral problem. I call your attention for example, to Ms. Kathryn Black's comment on Page 116 of the record that Michael has a behavior problem. And she worked with him, as we have heard, very intensively and knew him very well.

This behavior problem is not a primary emotional disorder. Rather, it flows from the child's style of incomplete attention. And then, finally, what happens very commonly, and happens occasionally in Michael's case, is aggression, because these children have very limited frustration tolerance, secondly to which they may flare up.

And, again, at times in the record, there are comments on aggressive behavior. In kindergarten, Dr. Lott in his case history puts on record that Michael has been aggressive. But this aggression isn't the burning anger of a psychopath. It is secondary to a maladaptive style of acting that I have described.

Now, with respect to handling this situation in the classroom in such a way as to enable the child to function appropriately and learn, what one has to do is both give the child a lot of attention, but only in little bits, so not to foster a dependence of the kind that I've described, which is ultimately [2-51] nonproductive.

So one sets a child on a proper course. One moves away, but one keeps an eye on the child. And at the first sign, not the

second or the third, but at the first sign of some disintegration of concentration, one darts over there, sets the child up again, and then goes off again.

And the whole thing is constrained by very clear contingencies. For children like this, it's no good saying, if you don't work well, you won't go to the circus on Saturday. The circus is now. And it is now that the consequence has to be. It doesn't have to be a big consequence, but it has to be tangible and present.

Now, the description of the program that Mr. McAleer gave yesterday is of the kind that I have in mind.

Now, the other aspect that has been called into question in this case is the presence of dyslexia.

I'd like to make a statement, first, upon the term and then discuss it in my own way.

I do not use the term dyslexia. In fact, I regard it as reprehensible to use that term. And I would like to explain why I do so.

In effect, I will refer, if I may, [2-52] your Honor, to a book by my colleague, Dr. Melvin Levine, who will be a witness subsequently, which I have with me.

THE COURT: Before you tell me why you dislike the term, what precisely does it mean?

THE WITNESS: I was tempted, also, to consult my colleague, but I think — because he does say so, but I know it myself.

A dyslexic child is a child who has a reading and spelling and writing problem, such that his accomplishments in those fields are significantly, perhaps two or more years, behind those to be expected of his age and intelligence level. It being the case, that such difficulties cannot be explained by environmental or emotional reasons or by poor teaching.

Now, these are the exclusionary definitions of dyslexia.

Further, to the diagnoses of dyslexia, one has to be able to show affirmatively what aspects of the child's mental de-

velopment, relevant to reading and writing, spelling, has, in fact, not matured at the appropriate rate. And psychological and psychoeducational are supposed to do that.

THE REPORTER: Would you repeat that?

THE WITNESS: Psychological and psychoeducational tests are supposed to do that.

[2-53] I will come back to testing in Michael's case to illustrate that point.

The problem with dyslexia is well summarized by Dr. Levine on Page 103 of his book. And if I may read the relevant words?

THE COURT: Perhaps, before you do that, you should give the Reporter the title of the book.

THE WITNESS: Yes, I will.

The book is called "A Pediatric Approach To Learning Disorders," by Dr. Melvin Levine and others.

MR. ROSENBERG: May I just have a page reference your Honor?

THE WITNESS: It says 103.

MR. ROSENBERG: 103?

THE WITNESS: Yes, it is.

MR. ROSENBERG: Thank you.

THE WITNESS: The term dyslexia will not be applied in this section.

And he goes on to say: "That the National Advisory Committee on dyslexia and the rate of reading disorders believes that the use of the term dyslexia serves no useful purpose."

Dr. Levine goes on to say: "Such a label implies a homogeneity of etiology, namely of causation, of pathophysiology of a nature of the brain disorder, [2-54] clinical manifestations, and treatment that simply does not exist among the population of children with deficient reading skills."

In other words, that is exactly why I object to dyslexia. It suggests a single medical disease with a specific treatment. It

is not and there is not. If one diagnoses dyslexia, no obvious recommendation flows from that. If one diagnoses pneumococcal pneumonia, penicillin flows from that. If one diagnoses dyslexia, the question can then be asked, so then what management program will be used, and there are many to choose from.

Now, the choice of those programs is not random, nor matter of personal preference, but is based upon something much more pertinent than the label dyslexia. Namely, the particular reason why this particular child is having trouble. Because, after all, the reading calls upon many mental skills, any one of which is vulnerable to delayed immaturities. And one then tries to test the child in a relevant way to determine what the weakness springs from in that child's case. Because that will help in determining the educational approach.

So many, if not most, dyslexias are language based. They're what I sometimes call the tip of a [2-55] language iceberg. The child, although clinically overtly having trouble with reading, may have been slow to develop language, may have trouble understanding complex sentences, even in the spoken speech field.

In fact, Orton, who was the originator of the Orton-Gillingham method of teaching, often called what is otherwise called dyslexia by some, specific or selected language disabilities, because he emphasized the language basis.

Of many cases. But then there are other cases that are quite different.

I published a paper in 1963 in which I described another subtype of dyslexia, which, in fact, I named after an Austrian neurologist named Gerstmann, G-e-r-s-t-m-a-n-n, because he had described a similar appearance in adults with brain damage.

These were children who had directional confusions. Couldn't tell right from left. When they made spelling errors, they didn't put in the wrong letters so much as they got the right letters in the wrong order.

And whereas the language based dyslexias tend not to affect mathematics until the level of about fourth grade when mathematics gets to be presented in a written story-problem form, these [2-56] Gerstmann children do have mathematical problems. Namely, they confuse the place value of the digits. By place value, I mean 54 versus 45, kind of confusion. They have trouble with arithmetic computations.

Now, I bring out this point for more than one reason. One reason is because it is a quite different kind of reason for failing to learn to read in the first, and clearly, the same problem won't deal with both.

The second reason is that as I surveyed the record, if there is any evidence for any sufferer of dyslexia, it's that. And I will comment on that point.

The record of psychological testing of Michael is voluminous, very comprehensive, and certainly gives the reader and gives me more than enough material to form my opinion.

What is overwhelmingly striking is how well he does.

There isn't a single test in the record which he does badly enough to explain his reading problem or his writing problem. Of course, he's better at some things than other, we all are. He does better at language tests than he does at certain tests called vision and auditory sequencing.

[2-57] But I would like to point out that you might see the same performance or even a less good one from a child who is reading normally.

So if you look at those tests, you wouldn't know the child had a severe reading problem, unless you look at the way he did the tests. Because as I have already mentioned, virtually every observer commented on his lack of organizing ability, his lack of planfullnes. And the tests he does less well than others are the ones that require planning, organizing, grouping of the material.

So when we find that he has some trouble with visual sequencing tests, the reason probably is, although these tests

often are failed for more than one reason, that's why I say probably, that he was unable to organize the material in a way to facilitate remembering. And that organizing problem, of course, goes back to the attention deficit, that I've already described in some detail.

So the point I want to make is that —

THE COURT: Why is that so? Why does the inability to organize necessarily bring you back to the attention deficit?

THE WITNESS: Because in order to organize, one needs to reflect, think and pay attention. One [2-58] cannot organize at the drop of a hat, unless one is already highly practiced in that particular form of organization. In order to organize novel materials, which after all test materials are, one has to think a moment or more than moment how to do it. And very typically, too, and with an attention deficit, fail or pass up an opportunity to do so.

So, in my opinion, all the manifestations that are shown in Michael's case, as well as all the test results that are there, could be accounted for by the attention deficit. That is not to say that they are. Because, were one to remove his attention deficit in some way, one could then retest and see whether problems remain. And I cannot exclude the possibility that some might.

If they did, maybe some problems in the Gerstmann area, that I mentioned earlier, could be underlying. I do not see enough in the record to justify the diagnosis of Gerstmann Syndrome as I have described it and as I understand it.

However, as I say, he may have a relative weakness there, which by itself wouldn't have caused trouble; but compounded with the attention deficit, might well be causing trouble.

Now, how then would one manage the reading [2-59] in such a child?

One wouldn't plug in the automatic treatment for dyslexia, because there is none. One would certainly try a variety of options. And, by all means, the Orton-Gillingham Method is an

option that would merit trying. It is successful with some children with reading difficulties. I would stress "some." There is no method that is successful with all of them, because they're so different. I would not expect there to be such a method.

And, in fact, the method was tried and it failed.

Now, given that the method failed, one has to analyze the situation to determine why did it fail? Where —

THE COURT: What was the method that was tried and failed?

THE WITNESS: The Orton-Gillingham Method. It was tried by —

THE COURT: When was that tried?

THE WITNESS: It was tried by Ms. Kathryn Black. She used it for a year and a half. And after initial progress, he got stuck, as the record vividly documents.

Now, what is significant here, your Honor, [2-60] is the way in which he got stuck.

The Orton-Gillingham Method is one of a family of phonic approaches. It is neither the first nor last of those. There are quite a few of them. I list some in my book. Dr. Levine lists others, and some of the same in his.

What one does is to do what educators call word attack. You sound out the constituent speech sounds, otherwise called phonemes, of a word. You practice a child on relating each speech sound to its written symbol. And one then tries to get them together into a total word sound.

And this works well for words which are regular in the language. One can learn a speech sound, letter correspondence, and apply it elsewhere.

But, of course, and as Mr. McAleer pointed out, about half the words in language are not regular. So there are limitations in the phonics approach. But it certainly is useful for establishing an initial vocabulary.

However, it is not useful if a child learns to sound out a word letter by letter and then just keeps doing that. Because one

cannot read the newspaper sounding out speech sounds. In other words, useful reading cannot be achieved exclusively by learning [2-61] to sound out speech sounds. It's a step toward useful reading, but further steps have to be taken.

Michael got stuck. He got good at sounding out the speech sounds. He was good at word attack, but he wasn't able to make that next step to acquire fluency. This is why I said, at the onset, that the challenge now was not any more the phonics aspect of it, but to turn what had been gained into fluency.

And the place at which he got arrested in his reading progress was that place.

And the reason that he is still, at least as based on the last Carroll School reports, hovering at the late second, early third grade achievement levels in key aspects of reading, still seems to be the same. He is stuck at what has been called a phonic hurdle. Somebody who just does phonics, phonics, phonics, and cannot limp [*sic*] beyond that stage.

Now, that is a difficult matter to resolve. Certainly, it is not resolved by just keeping, doing more of the same. And just to continue an approach which has not worked would not seem sensible.

What one has to do, obviously, is to try various devices for fostering fluency.

Also, in Michael's case, one has to make the task more interesting. Orton-Gillingham is very, [2-62] very boring. It is very mechanical. A dreary thing to do.

If a child is very motivated and can attend, that doesn't matter, and some kids do very well.

But for Michael, it is understandable how his attention would constantly flag. He needs an approach which is more active. He needs some personal control.

As an example, let me give you the Language Master, which Mr. McAleer mentioned as one of the devices that he was planning to use. Here, you have cards that are flashed on in a tachistoscope, t-a-c-h-i-s-t-o-s-c-o-p-e. It is a device for

briefly exposing visual material for fractions of a second. One can——

THE COURT: Subliminal approach?

THE WITNESS: No. It's hopefully, superliminal or nothing would be learned, if one wanted to know.

But certainly, vaguely, exposure. So you cannot sound out the word letter by letter if it comes on for a fraction of a second, so it, in a sense, compels the child to try to get more of an overview and, in fact, increase his sight vocabulary. Sight vocabulary, regardless of the exact number that the [2-63] child had, has been a big problem with Michael. No question about it.

Now, another —

THE COURT: What do you call this method?

THE WITNESS: The Language Master.

Now, sight vocabulary is something that is necessary for fluent reading. And, certainly, for example, for skimming, as was brought out earlier. How much is necessary depends on the passage.

But for fluent reading, one cannot stay at each word for a long period of time. It certainly deprives that reading of any fun or informational usefulness.

So the child needs to be able to intervene. With the Language Master, the child can himself trigger the exposures.

In other words, there are a variety of devices for getting the child to read quickly, use his skills. Devices such as — it sounds very simple, but it's effectively reading to the child what the child is reading at the same time the child is reading it. So a child half learns it all by heart and half, in fact, reading it.

This one, it is called the Imprest Method by some. I-m-p-r-e-s-t. I haven't heard it specifically [2-64] referred to. I'm giving it to you as an example of the kind of way that one might approach the problem of the phonic cripple.

Now, in my opinion, the type of approach that Mr. McAleer outlined to me in conversation when I visited him at the Pine Glen School and what I heard yesterday is consistent with the prospective that I take of the case and which I have explained.

So specifically with regard to the thirteen provisions of the Individual Educational Plan, the provisions that I regard as most significant are Nos. 2, 3, 5 and 6. And I would like briefly to say why I choose those, and then, after that, 12 and 13.

"To apply mastered phonetic skills to reading." That's what I've been discussing. He's mastered phonetic skills, but how can he use them fluently to read?

"To increase visual memory for sight vocabulary." Yes. Essential for learning.

"To develop oral reading fluency." Somebody who sounds out a word letter by letter can clearly not read fluently.

"To increase auditory and visual sequential memory processing skills." Sequence is the important point here. Not just to recognize the individual [2-65] symbol, but recognize the symbol as characterized by the sequence in which its constituents are. That's words.

And then the other important objectives are the attentional ones. And they are Nos. 12 and 13.

Which for some reason I'm failing to find at this time.

Ah. "To improve attention span and diminish distractibility." Which clearly relates to what I have discussed at some length.

And, "To develop positive independent work habits for task completion." This is a crucial point. He should be able to go off, do it, and finish it before being heard of again. That has been and is a cardinal problem of Michael.

So these are the reasons why I regard the Educational Plan as appropriate.

THE COURT: Why don't we take a recess before we go on to the next step.

[Recess.]

Q [By Mr. Berman.] You have given us your basis for your opinion that the plan adequately addressed Michael's needs.

I'll now ask you to go on and give us the [2-66] basis for your other opinions that the School System could successfully implement it and that the setting was the least restrictive.

THE COURT: Haven't you already given us your opinion as to the successful implementation by Mr. McAleer?

THE WITNESS: Much of that is implicit in my remarks.

THE COURT: I thought so.

THE WITNESS: Perhaps very briefly I can just supplement those.

A My visit to the Pine Glen School is really the one further reason for my feeling that the school could implement the plan, which I should mention. I did, in fact, see the class in action. I was impressed by the favorable teacher-pupil ratio. I was impressed by the fact that children were working independently and, yet, getting continual, but not constant attention. And I though this was the kind of environment in which a child with a difficulty attention deficit could do well.

I also observed that to be — possibilities for mainstreaming were rather good. The math class was right across the corridor from that class.

THE COURT: I'm sorry?

[2-67] THE WITNESS: The mathematics class was right across the corridor from Mr. McAleer's class.

As I mentioned earlier, I visited the art class. I thought the atmosphere was pleasant and informal. The kind that a child like Michael would enjoy.

I also noticed that the children who had physical disabilities, such as cerebral palsy and so on, were served on a different floor. So that did not seem to be any implication that that class was, by its physical location, singled out as being a container for different children.

But as you remarked, your Honor, most of my answer to that question are implicitly what I've already said.

A [Continuing.] The final point was the issue of least restrictive. And, again, I can be very brief.

The fact that mainstreaming was contemplated from the very beginning of that year, renders it less restrictive than a prototype in which mainstreaming is not provided for in the foreseeable future.

So I based my opinion on that fact.

Q Dr. Kinsbourne, did you ever see or examine Michael?

A No, I never did.

Q And have you an opinion as to whether your failure [2-68] to see or examine him, detracted from your ability to give the opinions that you have given?

A Not in this case, because the documentation was so excellent and comprehensive.

Q Now, I am going to direct your attention to various findings made by the Hearing Officer, which findings are in evidence.

And you have the Hearing Officer's report there?

A I do.

Q This is directing your attention to Page 8 of that report, please.

THE COURT: Where does that appear, Mr. Berman? Is that part of the tr[illegible] script?

MR. ROSENBERG: It's attached to his complaint.

MR. BERMAN: Attached to my complaint, your Honor. But let me —

MS. JANOS: Your Honor, It's also Exhibit B-13, which should be the last group of exhibits in that pile.

MR. BERMAN: Does your Honor —

THE COURT: I have it.

Q I would like to direct your attention to the second paragraph on Page 8, beginning, "Mr. McAleer testified that he had taught just three children in five years."

[2-69] With respect to the statements in that paragraph, have you an opinion as to whether or not they support the decision to remove Michael from the program that had been designed for him by the Town of Burlington?

MS. JANOS: Objection.

THE COURT: What's the objection?

MS. JANOS: He's asking the witness if the Hearing Officer's findings support her ultimate conclusion, which is a matter for your Honor to decide. He's already gone through his opinions about Michael and about the plan and the program itself. I don't think it's appropriate for him to address the Hearing Officer's specific findings and see if they are supported by the evidence in the case.

THE COURT: I didn't understand that that was the question.

I understood Mr. Berman to ask the witness's expert opinions concerning certain statements by the Hearing Examiner, such as that the child should continue with the Orton-Gillingham Method in which Mr. McAleer apparently wasn't trained.

Isn't that correct?

MR. BERMAN: That's correct, your Honor.

THE COURT: I think I know the answer.

[2-70] A I do have an opinion.

Q What is your opinion?

A I think the Hearing Officer is wrong.

Q Would you stated your basis for that opinion, please?

A First of all, there is no particular reason why a teacher who addresses problems of children with selective reading disability has to be trained in a particular method. There are many available methods. They all have good ingredients. In fact, the best teachers do not conform to any one method, but take freely from a variety of methods to fit the child's individual needs.

And I think to continue and persist in a given method doesn't make for what the Hearing Officer in that paragraph calls consistency. I think it misconstrues the meaning of consistency. That's rigidity.

The fact is that there were several ways of addressing Michael's reading needs at that time, of which the Grush Method would seem to be one.

So it's irrelevant, in my view, of whether Mr. McAleer happened to be an Orton-Gillingham practitioner or not.

I might also point out, as has in fact already been mentioned, that in its beginning the Grush Method is quite similar to the Orton-Gillingham in its phonic [2-71] approach. The importance is what comes later; namely, the way in which fluency is attempted and independent work is attempted.

Q And I would like to direct your attention to the last sentence of that paragraph and ask you your comment on any opinions you have with respect to that sentence.

THE COURT: Well, wait a minute. The objection of Ms. Janos to that question was sustained.

MR. BERMAN: Yes. Well, let me approach it differently.

Q There is a sentence — there was evidence in this case that Massachusetts General Hospital staff additionally state a need for assistance through specialists, skilled and experienced in learning disabilities.

First of all, have you an opinion as to whether Mr. McAleer was a person skilled and experienced in learning disabilities with respect to the type that this child had?

A I have an opinion.

Q What is your opinion?

A That he is and was.

Q And now I would like to direct your attention to the third paragraph on Page 8, please, Dr. Kinsbourne.

THE COURT: Same page?

MR. BERMAN: Same page, yes.

[2-72] Q Have you read that paragraph, Dr. Kinsbourne?

A I have in the past read it.

Q And I would like to ask you whether you have an opinion as to whether the conclusions stated in that paragraph justify the removal of Michael from the IEP that was prepared by the Burlington Public Schools for the year 1979-1980?

MS. JANOS: Objection.

THE COURT: Why don't you —

MS. JANOS: I think there's a number of conclusions in that paragraph.

THE COURT: — address the conclusions that you're referring to?

MR. BERMAN: All right.

Q The conclusion that I am referring to is that the peer or group situation in Mr. McAleer's class, as it would have been constituted for the year 1979-1980, was not conducive to Michael's improvement in reading skills.

A Yes, I have an opinion of that.

Q Will you please tell us what your opinion is?

A My opinion is that the Hearing Officer misunderstands the role of the peer group in the instruction of a child of this kind.

The only way I can understand what she is [2-73] writing here, and I have to summarize how I understand it, so my own remarks have a point, is that she regards learning to read as a group activity, as kind of like a team sport, where it is good to do it together.

In fact, she expresses doubts as to whether the program might not be too individualized in view of that approach.

Now, I think that's quite wrong. Learning to read is an individual matter. It is usually done in a group situation, not because a group situation facilitates learning to read, but because it's convenient for society to teach children in groups when this can be done in a practical fashion.

However, anybody learns anything better in an individualized way. One learns to ride a bike better if one is taught it individually.

Now, most of us can learn, in spite of lack of individualization, most of the things. But those of us who experience real difficulties, need individualization.

Now, the presence of the group has some merit and some uses. Certainly the point has been made and should be made that the child should be aware that he's not the only one in the world with a problem like — with a problem. It doesn't have [2-74] to be the exact same problem. Children don't make such fine distinctions, but there are also other children also, who need individualized help. The child should be aware of this.

Secondly, the child should be able to work where other children are working, other than to disturb them and be disturbed by them. It's part of the behavioral approach. It can be fostered. This is training for living in the real world where there are other people.

But in the beginning of any program, and it would be appropriate for Michael, what he learns, he learns himself. He learns in confrontation with a teacher or the aide. He learns, given the assignment, given to him by the teacher or the aide.

The other children are doing what they're given to do. Ultimately, as Mr. McAleer has said, it is a goal to be able to do that together. That is a social goal. That is not specifically a reading objective.

So the point here is that we are not, I think, looking for tightly matched children with the exact same difficulty. Which, in fact, you will never get, anyhow, because these children are much too various, for that ever to be possible to achieve. Neither in Burlington nor in the Carroll School.

[2-75] We're looking for the ability of a child to function in a small group context, which is transitional to functioning, again, in the large group, mainstream.

Q Now, there is also a statement made in that paragraph, which is in evidence: "Even if a group structure were possible, the skill variance among students might have the effect of increasing Michael's frustration."

I will ask you whether you have an opinion with respect to that statement?

A I have an opinion.

Q What is your opinion?

A The question of skilled variance is a — it's a relevant matter. It is of some importance, but not much.

Even if children at the beginning of the year are matched in their skills exactly, which is hardly possible anyhow, by the end of the year they will no longer be matched. Some would have learned much better than others.

At all times, the human being who had difficulties is exposed to the fact some others do not. You cannot protect anybody from such a reality, nor would you wish to. Of course, you would want to minimize the impact of that reality. And you do this by sensitive handling of the situation.

[2-76] But, basically, skilled variance, to my mind, is a subsidiary issue. And certainly, it shouldn't be extreme in terms of kindergarten as together with high-schoolers. But it's not, I think, a matter of cardinal concern.

Q Do you have an opinion as to whether the skill variations in Mr. McAleer's class were too great?

A I have not seen information giving me the details in which I could base such an opinion.

Q Directing your attention, Dr. Kinsbourne, to the top of Page 9.

I would like to direct your attention to the statements in that paragraph, particularly the statement that integration into a regular math class would not be an appropriate action. And she says, "at this time," I assume she means during the 1979-1980 school year.

And I'd ask whether you have an opinion with respect to that statement in evidence?

A I do.

Q What is your opinion?

A My opinion is that simple integration to the regular math class without further provision would, indeed, not be appropriate. But as I understood it, that wasn't always contemplated. [2-77] This is a matter that I discussed with Mr. McAleer at the time I visited the Pine Glen School. And he explained to me how such integration, such mainstreaming is performed. Namely, that the structure, that the reward system which he has described in detail, is carried over into these regular classes.

And he described to me the wealth of communication between him and the teachers in the regular classes relative to the children in question.

Given this continuity of structure and approach and given the fact that, relatively speaking, Michael was doing much better in mathematics than in reading, it seemed to me a reasonable thing to try to do.

Obviously, how it worked would emerge over time.

Q I'd like to direct your attention, if I may, to the fourth paragraph on Page 9.

And there's a brief paragraph, effectively expresses a certain conclusion. I'll ask you whether you have an opinion —

A I do.

Q — as to whether or not the statements made in that paragraph justify the removal of Michael from the proposed program at the Pine Glen School?

[2-78] MS. JANOS: Objection.

THE COURT: You're asking whether the shortening of the school day would be a reason not to put him into the Pine Glen School?

MR. BERMAN: That's correct.

THE COURT: You're not asking him to comment on the facts?

MR. BERMAN: Oh, no.

A I have an opinion.

Q Would you please give us your opinion?

A My opinion is that the issue is not of sufficient significance to be weighted in such decisions.

In terms of fifteen minutes, Michael has had many fifteen minutes in three years that that —

THE REPORTER: Is that sixteen or fifteen?

THE WITNESS: Fifteen. One five.

A — many fifteen-minute periods from which he has benefited little or nothing.

The important issues are the quality of the instruction received, or to be received, rather than fifteen minutes more or less.

Q Now, directing your attention to the fifth paragraph on Page 9, the paragraph entitled — numbered "1," under "Regulatory Requirements," I shall ask you whether you have an opinion as to whether placing this child [2-79] in Mr. McAleer's classroom which allegedly had children in it exceeding 36 months in chronological age during the 1979-1980 school year would have interferred with Michael's progress in that class?

A The span of three years is a rule of thumb.

It is — in itself, it really tells one very little. One would have to know what the children were like; how they were functioning.

I cannot — it is not automatically the case that if there is a span of more than three years, that the child's education would suffer. That would be totally inadequate data to draw such a conclusion.

Q Well, I shall ask you to assume, because there is evidence in the record to this effect, that the span in Mr. McAleer's classroom, the chronological age was 40 months.

MR. ROSENBERG: Your Honor, I do not believe that is what the record shows. I believe it was seven years to eleven

years. And I don't know, frankly, from that statement whether it's 40 or 48, or whether it's a young seven and an old eleven. But what I have read, it's seven to eleven years. I would be prepared to be corrected on that.

MR. BERMAN: I believe that the testimony was that the —

[2-80] THE COURT: Whose testimony?

Here?

MR. BERMAN: No. The testimony that was received by the Hearing Officer, which has been marked —

THE COURT: Why don't you just use seven to eleven?

MR. BERMAN: All right. Very good. Why don't I use seven to eleven and —

THE COURT: Where it points out, it could even be more.

MR. BERMAN: Yes.

A If I'm — I'm trying to be clear. But I've been asked about a point in principle or about Michael. At the time Michael was nine-years old. Clearly, as far as he's concerned, to have a child up to two years younger or older would make hardly any difference. Whether the rights of somebody who is age seven or age eleven are violated, is another issue, which I haven't been asked to address.

MR. BERMAN: Excuse me, your Honor. Just one moment, please.

[Pause.]

MR. BERMAN: I have no further questions for this witness, your Honor.

THE COURT: Ms. Janos, do you have any [2-81] questions of this witness?

MS. JANOS: No, I don't.

THE COURT: Mr. Rosenberg.

MR. ROSENBERG: Could I take about a two-minute break, your Honor, just to look for one thing?

THE COURT: Go ahead.

MR. ROSENBERG: Okay.

Cross-Examination by Mr. Rosenberg

Q Good morning, Dr. Kinsbourne.

How are you currently employed?

A I'm Director of the Behavioral Neurology Department at the Eunice Kennedy Shriver Center, Malden, Massachusetts.

I'm also a staff member of the Department of Neurology at the Harvard Medical School and the Mass. General Hospital, and Adjunct Professor of Psychology at Brandeis University.

Q Okay.

Is your position at the Shriver Center a full-time position?

A It is full time.

Q And what precisely does it entail?

A I am Director of a research department. I have a [2-82] staff of investigators, and we have a further staff of technicians and students. And we do research in developmental disabilities, largely.

Q Do you — in your capacity at the Shriver Center, do you diagnose children with learning disabilities?

A Yes, I do.

Q And do you do that for research purposes or for providing advice to parents and the school?

A In my capacity, I do it for research purposes.

Q Now, you have another position at the Mass. General Hospital, is that correct?

A Yes.

Q And precisely what is that?

A I am Clinical Associate in Neurology at the Mass. General Hospital.

Q Do you see individual patients in that capacity?

A Not at this time, no. I'm not doing so. Not yet.

Q Do you have a private practice in which you see individual patients?

A I have a limited private practice. I keep it — small numbers.

Q Okay.

And your position at — is it on the Harvard Medical Faculty? Are you on the Harvard Medical School Faculty?

[2-83] A Yes.

Q Precisely what is your position on the Harvard Medical School Faculty?

A I'm lecturer.

Q You're a lecturer?

A Yes.

Q Do you know Dr. Lott. Dr. Ira Lott?

A Very well.

Q Is Dr. Lott a colleague of yours at the Shriver Center?

A He is.

Q Is he colleague of yours at Mass. General?

A He is.

Q Is he also an Assistant Professor at Harvard Medical School?

A I am not aware of his titles.

Q Is he on the faculty at Harvard Medical School?

A Yes, he is.

Q Do you have respect for Dr. Lott's opinion professionally?

A Opinion about what, Mr. Rosenberg?

Q In general?

A I have general respect insofar as I know what that means.

Q Do you have general respect for his professional competence?

A Absolutely.

[2-84] Q Okay.

Do you have respect for his competence in the area of neurology?

A Certainly.

Q Do you have respect for Dr. Lott's opinions in the area of neurological problems for children?

A Certainly.

Q Do you have respect for his opinion in the area of diagnosing learning disabilities?

A I hate to use the word "disrespect," but I regard his expertise in that field as far less than in the matters that you have mentioned so far.

Q His expertise in that field is less?

A Much less.

Q Okay.

Would Dr. Lott know a hyperactive child, do you think?

A Not necessarily.

Q You don't think so?

A No, no.

Q Not necessarily?

A Not necessarily. It depends on how clear-cut the case was. It depends on many issues. The diagnosis isn't always easy.

Q Incidentally, in making that diagnosis, what steps [2-85] do you as a clinician normally take?

A The diagnosis of attention deficit disorder, hyperactivity, just like that of dyslexia, is based on behavior. It's based on what the child does and how the child acts.

So all these diagnoses are based on testimony. And the testimony of most importance comes from the school, professionals who observe the child, and the parents.

Q Just so the terminology is clear, because I want to make sure I'm using the same terminology that you are, did I understand correctly that there are two possible, I believe you used the phrase, intrinsic causes of reading problems, or learning disabilities? Is that correct?

A There is an initial classification of two types of causes, and they then subdivide further.

Q Okay.

Let's just stick with the broad subdivisions, so that I can understand.

Now, I used the term, which neither you nor apparently Dr. Levine thinks is appropriate, called dyslexia. Is that correct?

A You did.

Q Okay.

[2-86] Now, am I correct, that another way to characterize or to phrase the traits that used to be called dyslexia, shall we say, is visual processing problems?

A No, you're not correct at all.

Q Is there any phrase that you would use that would connote the same kind of characteristics as those of us who improperly use the term dyslexia?

A I have already used it.

Q And what is that, sir?

A Selective reading disability.

Q Selective reading disability?

A Is how I would — what I would use.

Q Now, the term you — the other term, the other kind of problem, I take it, you know are referring to as attention deficit; is that correct?

A Yes. This is a recent terminology, introduced by the American Psychiatric Association, which I find to be helpful.

Q When was that introduced, by the way?

A 19 — I think it was '81. It's in the Diagnostic & Statistical Manual, Version III.

Q All right.

A '80 or '81.

Q The term that used to be used was hyperactive?

[2-87] A Yes. And still is by many people.

Q In fact, you've used it as recently as May 27th, haven't you?

A Yes. I mean, I don't know what happened May 27th, but I'm sure that in conversation I did.

Q No, I mean in your report to do with Michael Panico in this case?

A May 27th?

I didn't do a report — oh, you mean last year, maybe?

Q I — well, let's see. We're not at May 27th, I believe. I mean, May 27th of 1981.

A I quite likely did, yes.

Q And you also used the term dyslexic in that report, didn't you?

A Yes.

MR. ROSENBERG: Now, your Honor, this report has been submitted as one of the — correct me if I'm wrong — it was in a supplement to the answers to the interrogatories. I want to make sure that the Court has Dr. Kinsbourne's report. And I will either offer it in evidence, or if it's already in, refer to it.

THE COURT: Well, if it's simply one of the papers in the file, it's not in evidence. [2-88] So if you want it in evidence, you should offer it.

MR. ROSENBERG: Okay. Fine.

THE COURT: Are you objecting, Mr. Berman?

MR. BERMAN: I would not object.

THE COURT: Exhibit 4, Dr. Kinsbourne's May 27th, report, 1981?

MR. ROSENBERG: That is correct.

[Report of Dr. Kinsbourne dated 5/27/81 marked Defendants' Exhibit No. 4 in evidence.]

Q Just so we're clear, this is a report that you did in connection with Michael Panico?

A Certainly.

Q Dr. Kinsbourne, so I'm perfectly clear on this, precisely whom have you interviewed in order to form your opinion about the diagnosis of Michael Panico's problems?

A My opinion on that diagnosis was not based primarily on interviewing, although, it was certainly supplemented by interviewing Ms., then, Mason, who described Michael's

behaviors to me, as she has also done in testimony, which was consistent with what I found in the record.

Q I understand that. Would you just answer my question, sir, as to who, the names of the individuals you interviewed?

A Ms. Mason.

[2-89] Q Did you interview any other person with respect to the diagnosis or your diagnosis of Michael?

A I cannot recall, at the moment, that I did. I'll tell you if I can think of any.

Q Well, let me see, Doctor, did you, so we're clear, interview either Mr. or Mrs. Panico?

A No, I didn't.

Q Did you interview Michael's kindergarten teacher, Ms. Rubin?

A No.

Q Did you interview —

THE COURT: He told us he hasn't interviewed anybody else. Why do we have to run through the list, concerning the diagnosis?

MR. ROSENBERG: Okay.

I just want to make sure that that is his testimony on this point.

Q Now, you referred to a book which you wrote. It's this book, isn't it, "Children's Learning & Attention Problems"?

A Yes.

Q That's your most recent book?

A On this topic, yes.

Q On this topic, isn't it?

What's the point of the book?

[2-90] A The book was written primarily for pediatricians, but those of other relevant people, it's a handbook, really. It is meant to be a practical guide to understanding the concepts involved. When children have what I have described today as intrinsic problems in academic skill acquisition.

Q Is it a practical guide to diagnosing their problems?

A Yes, it is.

Q And is it a practical guide to taking steps to deal with those problems once you've diagnosed them?

A It is, within the limits of the professional scope of physicians and psychologists. It is not a practical guide to specific educational steps to be taken. It stops short of remedial education.

Q Now, am I right, Dr. Kinsbourne, that there is an entire chapter in that book that is called "Diagnosis"?

A I would hope so. I would have to remind myself of the index.

Q Sure. Chapter 4. Am I correct?

A I have it here, yes.

Q Okay. Now, Dr. Kinsbourne, I would like you to refer to what has just been marked as Exhibit 4, which is your May 27th report. [2-91] And I'd like you to turn to Page 2 of that report.

And I'd like you to read to the Court, please, the last sentence just prior to the word "Findings."

A "My inquiries into these aspect of Michael's development indicate unequivocally that Michael is, in fact, suffering from hyperactivity."

Q You have no doubt that Michael was suffering from hyperactivity?

A That's my diagnosis.

Q Now, I would like you to refer to Page 3 of that same report, Exhibit 4. And I would like you to read the last sentence on Page 3 prior to the term or the phrase you have used, "Educational History."

A "Therefore, the diagnosis of dyslexia is not applicable and dyslexia does not explain Michael's problems."

Q Now, would you — excuse me, strike that question.

What does the phrase "differential diagnosis" mean?

A That is a heading under which one considers the various possible reasons for a symptom or complaint or other difficulty.

Q And in deciding whether Michael was unequivocally suffering from hyperactivity or clearly not dyslexic, [2-92] you are engaging, am I correct, in differential diagnosis.

A You are correct.

Q Now, doesn't Chapter 4 in your book, to which we have been alluding, specifically say, Dr. Kinsbourne, that careful interviewing of the parents is crucial to making a proper diagnosis?

A I'm sure it does. It certainly should.

Q So you don't have any question that your diagnosis in this case would have been aided, do you, by interviewing the Panicos?

A I had available to me interviews, the proceedings of interviews by the professionals. And, obviously, had I not seen the child or heard of the child otherwise, I couldn't possibly have made a diagnosis without that. But I had the record available.

Q Isn't it particularly true, Dr. Kinsbourne, that in making a diagnosis of hyperactivity, interviewing the parents is particularly important?

A Particularly as compared to what, Mr. Rosenberg? Would you explain the question?

Q You don't understand my question?

A There are a number of important matters. This, of course, is one of them.

Q Okay.

Are there various impulse, kind of impulsive [2-93] behavior that children engage in that do not constitute hyperactivity?

A Absolutely.

Q What are those?

A No — everything a hyperactive child does, at some time, a perfectly normal child might do as an isolated incident.

The diagnosis of hyperactivity doesn't refer to a qualitative difference in behavior between the hyperactive child and normal children, but a difference in the quantity, in the frequency in which behaviors are manifested.

So anybody is at times impulsive. Any child might, at times, be without attracting such a diagnosis.

What we're looking for, here, is a pervasive style of impulsive and inattentive behavior.

Q Now, don't you recognize in your book a category known as "Distractability & Short Attention Span," which is different from hyperactivity?

A Could you refer me to the page?

Q Sure.

A Then I will know what it is.

Q Page 217.

A Yes. I would adhere to the statements made under [2-94] the heading, "Distractability & Short Attention Span."

Q Well, why don't you read that statement into the record?

A "Attention may lapse or wander. It may lapse into inactivity in very passive and undermotivated people or into unconsciousness in cases of minor epilepsy. It may wander to the general environment, not only in hyperactive people, but also in people who are bored because they find their tasks too easy, too hard, or for some reason unacceptable, and may wander to internal thoughts or feelings in people who are anxious, obsessed or thought disordered."

Q Do I infer from that, Doctor, that one cause of distractability and short attention span can be that a task is too hard?

MR. BERMAN: Objection to the form of the question. I don't know what Mr. Rosenberg infers.

THE COURT: Well, he's asking the witness.

MR. BERMAN: He said, "Do I infer?"

MR. ROSENBERG: If you'd like me —

THE COURT: Change the question, "Can that mean?" Do you remember the question?

THE WITNESS: I do, your Honor.

A If the wandering of attention is limited to situations where the child is, in fact, doing a task which is too [2-95] hard for him, then that is a possible interpretation.

Q Now, in determining whether distractability and wandering attention is limited to those circumstances, is it not essential to speak with people who are outside of the school environment?

A The more — if one finds that the evidence one has is insufficient, one could certainly gather more evidence from other settings. That would be a useful thing to do.

THE COURT: Dr. Kinsbourne, where you talk in that book about distractability and short attention span, are you talking about a condition, which I understand you to be talking about when you talk about hyperactivity, or are you talking about particular moments in time?

THE WITNESS: In this case, your Honor, particular moments in time as distinct from a condition.

From moment to moment, children may behave in a particular way for many reasons, some of which I list.

Q Well, in differentiating between the occasional or from time to time distractability and attention span problems on the one hand, and what is called hyperactivity on the other hand, am I correct that interviewing the parent is crucial?

[2-96] A No, it's not crucial. It can often be very helpful. But if by crucial, you mean that it is impossible to do it without, then I would disagree.

Q Would you say it's essential?

A No.

Q Would you say that it's undesirable, Doctor, to base a diagnosis of hyperactivity on the comments of classroom teachers alone?

A It certainly would be undesirable to base such a diagnosis on the comment of one classroom teacher alone. One has to look for a maintained pattern of behavior with multiple witnesses.

I don't think it's crucial what the professional standing of the witnesses is.

Q In other words, Doctor, there are no factors that come into play when a teacher makes a judgment about the child's behavior that cause you to pause about basing a diagnosis on that teacher's observations?

A I did not use those words.

No, that is not what I said at all.

Q Okay.

Well, is it, Doctor, in your view, appropriate to make a diagnosis of hyperactivity, based on the observations of the teachers alone?

MR. BERMAN: I object to the question, [2-97] your Honor. I object because of the —

THE COURT: Sustained. That's not the evidence in the case, as I understand it.

MR. ROSENBERG: Okay.

Q Does Chapter 4 in your book contain an entire explanation of the methods of interviewing parents, the methods of taking a history, the methods of interviewing the child?

A In some detail, it does.

Q It does.

And would you, please, read for the record the opening paragraph of that chapter on Page 76?

A "When a child is brought in because of school failure, it is necessary to determine through testing whether or not the child really is failing. If the failure is real, the extent and elements of the failure must be determined. Whether or not the child is actually failing, it is also essential to understand family interaction patterns; how much of the child's relationships with parents and siblings contributed to or aggravated the child's failure experience. If it turns out to be no objective

academic failure, perhaps some interactions in the family created a situation where the child is mistakenly thought to be failing, to be falling below a standard the family has [2-98] established or supported. Careful interviewing on both psychological and educational testing are crucial to making a differential diagnosis in determining the nature and dimensions of the problem."

Q And in Chapter 4, when you're talking about interviewing, you're talking about interviewing the parents and the child?

A Indeed.

Q Now, Dr. Kinsbourne, you have said in your report, as I read it, that you read, "relevant documentation from the Town of Burlington."

Is that correct?

A I presume so. You could point. . .

Q All right.

A I imagine I used that phrase. It seems consistent.

Q Well, on Page 1, the second sentence.

A Okay. Right.

Q Now, Dr. Kinsbourne, did you read all of the exhibits that were introduced into the Administrative Record?

A I read the contents of this compilation.

Q Do you know what that compilation is?

A What it is in. . .

Q Perhaps you could read the title page of that compilation?

A "Michael Panico" — the sentence you want, I imagine, [2-99] is, "Documentation submitted by Burlington Public Schools."

Q Did you read the exhibits submitted by the parents?

A Is that what is called here, "Mr. Gallagher material"?

There is material —

Q There is an entire. . .

A If you could show it to me, sir, then I could tell you what I read.

Q All right.

We'll take them one by one, then.

Did you read all of these exhibits?

A I recognize many of them. I didn't read them in this format. I recognize many of them as included in here, which I have read.

For example, Dr. Lott's report, "Cortical Function" report.

I cannot guarantee that I have read every one of these.

Q Okay.

If an experienced neurologist who was experienced in diagnosing learning disabilities interviewed the Panicos and interviewed Michael, would it be your view that neurologist's opinion was entitled to greater weight than your own?

MR. BERMAN: I object to the question.

[2-100] There's no evidence.

THE COURT: Sustained.

Q Do you know —

THE COURT: You mean by Dr. Lott?

MR. ROSENBERG: Among others, your Honor.

Q Do you know Dr. Melvin Levine of Children's Hospital?

A I do.

Q Is Dr. Melvine Levine a well-recognized specialist in the field of learning disabilities and attention — attentional deficits?

A Yes. Of learning disabilities, certainly, yes.

Q Not attentional deficits?

A He places less emphasis on attentional deficits. But, still, he's very good.

Q He's very good.

Doctor, in your report, that is Exhibit 4, you predicated your finding of hyperactivity on a number of what you call "findings"; is that correct?

A I assume I used the word, again.

Q All right.

On Page 2, so there's no question.

A Yes. Okay. Subheading findings.

Q Now, one of the findings that's included in there, in your report, as I understand it, is that: "At ages one, three and five, Michael had accidents [2-101] sufficiently severe to require stitching."

Is that correct?

A Yes.

Q Does it make any difference to your diagnosis how those accidents occurred?

A Not with great specificity. One doesn't ever pin a diagnosis on any one event. And, certainly, one cannot diagnose hyperactivity based on having accidents at age one, three and five.

We're looking, here, for a pattern, which is just one small set of constituents.

Q Well, I understand it's only one of the factors you referenced? That's what you mean, it's one of the factors?

A Yes. By itself, these episodes would not cause one to pause. But they fit into a general pattern.

Q But in order to at least give them credence as one factor, do you have to know what caused them, Doctor?

A It would be, surely, of interest.

Q Do you know what caused any of those incidents?

A No. The record didn't show.

Q I'm sorry.

A The answer is no, I don't.

Q The answer is no.

Now, on Page 3, another one of the findings [2-102] on which you predicate your conclusion of hyperactivity is the following — it's in the middle of the first paragraph:

"He would often have to be pulled out of a line by children, and his behavior made it hard for him to be transported by bus."

MR. BERMAN: I respectfully object to the use of the word "by" for the word "of." It changes the meaning entirely.

MR. ROSENBERG: Oh, I beg your pardon. Did I — "transported by bus" is what I see in there.

MR. BERMAN: "Have to be pulled out by a line of children."

MR. ROSENBERG: Oh, I'm sorry. Let me read it —

Q Why don't you read it, so there's no ambiguity about what it says?

Would you read that sentence?

A Yes, sir.

"He would often have to be pulled out of a line of children, and his behavior made it hard for him to be transported by bus."

Q On how many occasions was it hard for him to be transported by bus?

A This is the proceeds of my interview with Ms. Mason. [2-103] And she told me that it happened repeatedly, but she did not tell me on exactly how many occasions.

Q Do you know whether this was a bus to and from school in the morning?

A That is what I understood.

Q Okay.

Dr. Kinsbourne, precisely when did you observe Mr. McAleer's class?

A It was in December 1980, to the best of my recollection.

Q That is a year and a quarter after the time when Michael would have entered the class?

A Yes.

Q On how many occasions did you visit Mr. McAleer's class?

A On one occasion.

Q On one occasion.

For how long were you there?

A About an hour. I can't remember exactly.

Q Less than a half a day?

A Yes.

Q Do you know how many of the children at that point in time had selective reading disorders?

A I certainly cannot tell you that now.

Q Do you know how many of the children at that time were hyperactive?

[2-104] A I cannot tell you about the diagnoses of the other children at that time.

Q Is it your opinion, Doctor, that Mr. McAleer's class would have been the appropriate class for Michael to be placed in?

A Yes.

Q I didn't quite finish my question.

A I'm sorry.

Q I was doing it in a halting fashion. I'm sorry.

Is it your opinion, Dr. Kinsbourne, that placement in Mr. McAleer's class is appropriate for Michael if the diagnosis is he is unequivocally hyperactive?

A Yes.

Q Now, if the diagnosis, in fact, is that he is — well, I will use my term — dyslexic, is placement in Mr. McAleer's class still appropriate?

A That would depend whether he also had or did not have significant attentional problems. In fact, the diagnostic labels are unimportant.

Q Okay.

A I think the question is: Is this child able to attend? How does this child behave? Whatever else you call him.

Q So that if his attentional problems stem from his [2-105] difficulty in attending to tasks, in reading for example, would that be the right class for him?

A If he had attentional problems only when engaged in a task too difficult for him, but otherwise not, then I think although he might do well in the class, I don't think Mr. McAleer would be needed for him. I think his expertise would be in excess of what that would call for.

Q And Mr. McAleer's expertise is primarily, is it not, with people whose fundamental problem is that they have significant attention deficits?

A I am not sufficiently familiar with Mr. McAleer's expertise to say what it is fundamentally. I certainly know that he has a lot of experience with such children.

Q I would appreciate your turning to Page 3 of what we have marked as Exhibit 4 of your report, Dr. Kinsbourne.

And would you read the sentence right after the phrase "transported by bus"?

A "At lunch he would throw food and eat off other children's plates."

Q And where did you obtain that information?

A From Ms. Mason.

Q From Ms. Mason?

A Yes.

[2-106] Q Did you see that reflected in any of the teacher reports?

A I cannot recall seeing any report about his behavior at lunch in the file that I reviewed.

Q Do you know whether Ms. Mason was his lunchroom teacher?

A She told me she was there a lot while he was having lunch. I didn't inquire as to who was his lunchroom teacher. I don't know that there is a lunchroom teacher.

MR. ROSENBERG: May I respectfully request about a two-minute or a five-minute recess? Would that be possible?

THE COURT: How much more do you have?

MR. ROSENBERG: I have, I think, but I do want to consult with Mr. Panico for a moment or two, about fifteen minutes at most.

THE COURT: You can have five minutes if you cut the fifteen to ten.

MR. ROSENBERG: I see. Thank you.

[Recess.]

MR. ROSENBERG: Ready, your Honor?

THE COURT: Yes.

Q Dr. Kinsbourne, have you been employed by the Town as an expert in this case?

A Yes.

THE COURT: You mean retained?

[2-107] Q Have you been retained?

A I have.

Q Have you been paid for your services?

A I have.

Q On what basis have you been paid? Hourly or?

A On an hourly basis.

Q An hourly basis?

A Yes, sir.

Q And at what hourly rate have you charged?

A At $125 an hour.

Q And do you know the total amount of your bill to date for your services?

A No, I don't have that.

Q Do you know how many hours you've spent, approximately?

A A considerable number. I really have not added those up.

Q Okay.

Has the total amount that you've been paid exceeded $3,000?

MR. BERMAN: I pray your Honor's judgment.

THE COURT: Oh, he's used as an expert. He's entitled to inquire about what the expert was paid, and it goes to credibility, I'm told.

MR. BERMAN: All right. Thank you, your Honor.

[2-108] I withdraw my objection.

A Probably, yes.

Q Have you been paid more than $4,000?

A I don't know. Probably not.

As I say, I really — I could obtain those figures, but I don't have them on me.

THE COURT: I have no doubt, Mr. Rosenberg, if I were to add up the costs of this lawsuit, they would take care of several years of private schooling, tutoring, and other things in this case.

MR. ROSENBERG: Well, your Honor. . .

THE COURT: I simply comment.

MR. ROSENBERG: Well, that assumes, your Honor, that the lawyers have been paid and are charging for their services, your Honor, an assumption which is not correct in my own case.

I have no further questions of this witness.

THE COURT: Do you have anything else?

MR. BERMAN: I have no redirect, your Honor.

THE COURT: Thank you, Dr. Kinsbourne, you're excused.

[Transcript of a portion of the trial held on May 14, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes a portion of the testimony of Mr. Robert Panico, a witness called by the Defendant Doe, found at Transcript Volume II, pages 2-109 to 2-144, and reproduced in the Record Appendix, Volume II, pages 2-109 to 2-144.]

[2-109] ROBERT A. PANICO, Sworn

Direct Examination by Mr. Rosenberg

Q Would you state your full name, sir?
A Robert A. Panico, P-a-n-i-c-o.
Q How old are you, sir?
A I am thirty-nine years old.
Q Are you married?
A Yes, I am.
Q And what is your wife's name?
A My wife's name is Rosann, R-o-s-a-n-n.
Q How many children do you have?
A I have three children.
Q Would you please state their names and ages?
A I have a daughter, Jodine, who is age fourteen. I have a son, Michael, who is age eleven. And a son, Steven, who is age nine — I'm sorry, age ten.

THE COURT: Steven is "p-h" or "v"?

THE WITNESS: "v".

[2-110] Q How are you employed, sir?
A I am a Supervisory Criminal Investigator for the Department of the Treasury, Internal Revenue Service, in Boston.
Q For how long have you been employed in that capacity?
A I have been a Supervisor for approximately ten years. I was a Special Agent for about four years prior to that. And I was a Revenue Agent for a couple years prior to that.

Q Have you attended college?

A Yes, I have.

Q Where have you gone to college?

A I attended B.U. and received a Bachelor's degree in 1960. Subsequent to that, I returned to B.U. for graduate work in Accounting. Subsequent to that, I went to Suffolk University to obtain a Master's degree in Education — excuse me, in Business Administration.

Q Have you been employed in any other capacity other than working for the Internal Revenue Service, Mr. Panico?

A Subsequent to completion of college, I took a job with the Star Market Corporation as a Management Trainee. And I stayed there approximately six months. I think I took a part-time job for a short time to carry me until I went to work for the Government. I had an appointment, and it was just an interim period.

[2-111] Q And you are the father of Michael Panico, who is involved in this case?

A Yes, I am.

Q Now, Michael attended the Memorial School; is that correct?

A Yes, it is.

Q Did he do that for the entire time he was a student enrolled in the Burlington School System?

A Yes. From Kindergarten through Grade 3.

Q Where is your house in relationship to the Memorial School?

A It's — I live on a side street, which you walk down the street maybe three- or four-hundred yards, you're in the Memorial School.

Q Was Michael ever bussed to or from school?

A No, he was not.

Q Did Michael receive some stitches when he was one-year old?

A Yes, he did.

Q What caused those stitches?

A A defective playpen. The playpen had a — it was a new playpen, it had a piece of iron sticking out, and I think it was the first day he was in it, he caught his mouth on it.

Q Did he receive some stitches when he was three-years [2-112] old?

A Yes, he did.

Q What caused those stitches?

A I was playing with my son, and I put a hat a soft hat over his head, and he fell and hit his eye on the chair.

Q Did he receive some stitches when he was five-years old?

A Yes, he did.

Q And how did those occur?

A He was playing with his brother and another child, and in my home, and he caught his mouth on the other child's belt buckle. His belt was undone and he caught his mouth on the belt buckle.

Q Mr. Panico, I'm going to show you what's been marked as Exhibit 5, Dr. Kinsbourne's report.

And I'd like you to read the sentence, that is, the third full sentence under the category "Findings."

A "At age six, he suffered concussion."

Q Has Michael ever suffered a concussion?

A Never.

Q I would like to direct your attention to May 18th, 1979. Did you attend a meeting at the Memorial School concerning your son, Michael?

[2-113] A Yes, I did.

THE COURT: May 18th?

MR. ROSENBERG: Yes.

THE COURT: Go ahead.

MR. ROSENBERG: Okay.

Q Who was present at that meeting, in addition to yourself?

A There was myself and my wife, a Gail Mason, Patricia Meade, Myra Fournier, and I believe Sally Hennessy, who was Michael's current teacher at that point in time.

Q And what took place at that meeting?

A At that meeting, we sat down and we were told that additional testing had been done on Michael. Ms. Meade and Ms. Mason told us of their tests. Told us that they found the memory problem. They were very concerned that Michael's problem is probably all related to memory.

We discussed Michael for a few more minutes, and at the meeting we were told that Michael's program the previous year had been cut in half; that Michael had regressed greatly in his reading, in his school work; that we had been told that he was making good progress when, in fact, he wan't; that Michael needed a total program —

THE COURT: You were told that you had been [2-114] told that he was making good progress but that he wasn't?

THE WITNESS: We were told at that meeting. If I might just interject one thing. When I say "that meeting," we sat down in a classroom. We talked, got his test results. We had a general — a meeting. We also talked as a group, in twos, with my wife, myself and two other teachers, my wife and myself, for instance, and Myra Fournier. In other words, we weren't sitting around the table for the entire period of time. During the meeting, and I just cannot say what exactly was said at what stage of that meeting.

THE COURT: No. I was just asking whether you were interjecting your own thoughts or whether somebody said —

THE WITNESS: No, we — I understand.

We were specifically told that Michael had not made progress and that we had been told that he was making progress.

Q And when you were told that his program was cut in half, to what were you referring?

A Well, it was specifically — what was specifically to was that Mike's reading, one-on-one with Kathryn Black, had been reduced to 30 minutes a day.

Q Now, is the Ms. Mason who was at that meeting the [2-115] Mrs. Cummings who testified yesterday?

A Yes. It is the same person.

Q Now, did Ms. Mason at that meeting ever mention to you that 40 percent of the time, Michael was acting out in the reading room?

A Never.

Q Did Ms. Mason ever mention that to you at any time?

A No. Ms. Mason had nothing but good things to say about Michael. The first time Ms. Mason mentioned it in front of me was at a hearing.

Q And when you say "at a hearing," are you speaking about the Hearing in this case?

A The Hearing in this case, yes.

Q Did Ms. Mason or Ms. Meade provide you with any more specificity about the so-called memory problem?

A No. Specifically, Ms. Meade and Ms. Mason at that time, Miss Mason, both talked to us, my wife and I, about the fact of what an unusual thing a memory problem is. Because to that point in time, they still could not determine what causes memory problems. And one of them recommended that we take him to a, I think it was a psychoneurologist. They would give us the name. They said it was a friend of theirs and maybe he could help. But memory was such an unusual thing or such a tough thing to diagnose, and they weren't [2-116] really sure what part of the brain even controlled memory. And they told us that we probably should look into his memory problem.

Q Now, was an Individual Educational Plan provided to you at that meeting?

A No plan was provided at the meeting, but the subject of a total program in a school for dyslexic youngsters was brought up.

Q Who brought that up?

A The exact person, I'm not sure of.

Q When you say it was brought up, do you recall specifically what was said about it?

A Yes, I do. It was stated that Michael has probably reached a point where he hasn't progressed; that he might now need a total program, directed toward children with learning disabilities.

I asked, naturally, what a total program was. And that's when we were told a school which specializes in dyslexia, where each teacher in every course knows the problem, knows how to deal with the problem, and where he would get continuity so that if he went from a — as Mrs. Black explained, and she did explain this part of it, that she had — he had her, and she could work with him and Michael might be fine. But to then throw Michael back into a [2-117] regular classroom after an hour with her, or after a half hour with her, was more frustrating than if he had never gone to her, because he now went in and he was thrown into a regular school with which he couldn't cope at all.

Q Now, at that meeting on May 18th, was another meeting scheduled?

A No, there was no meeting scheduled.

Q Did you attend a Core Evaluation Meeting for Michael in the spring of 1979?

A I attended — oh, in the spring. I attended two Core — three Core Evaluation Meetings. I believe one was in March, the May 18th to which you are referring and there was a June 4th meeting, also.

Q Now, after the May 18th meeting and prior to the June 4th meeting, did you receive a call, a telephone call, from Jean Arin?

A Yes, I did.

Q At what time of the day did you receive this call?

A The call had to have been after 3 o'clock in the afternoon.

Q Why did it have to be after 3 o'clock in the afternoon?

A Because the call was extremely distressing. I called my wife as a result of it. And my wife had told me that my son had just come home from school and was severely upset because he had been tested, he had [2-118] been forced to miss recess and lunch with his class, and it bothered him. And she wanted to know why they were testing him, and I told her why they were testing him, which I found out that day.

Q Where did you receive the call from Mrs. Arin?

A Where did she call from or where was I?

Q No. Where were you when the call came?

A I was in work, in Boston.

Q And what did Mrs. Arin say to you in that telephone conversation?

A Mrs. Arin told me that Michael had been undergoing psychological testing that day; that the results of the testing were — the correct words, the exact words she used, I don't — they were distressing or serious. I don't remember the exact word, but basically that there was a serious problem that had arisen, and she would like to meet with Rosann and I and the psychologist as — you know, very quickly.

I asked if we could meet that day. That's how serious she had explained, and I wanted to meet. I told her I could be there in an hour. And she said we couldn't meet because the school day was over and I — what the reason, either her or Mr. Cavanaugh had an appointment or had something else. And she said we could talk about it the next day, because I [2-119] wanted a quick appointment, and we had set the appointment for the next day.

Q And just for the record, who is Mr. Cavanaugh?

A I have been told that he is the School Psychologist.

Q Okay.

Did you, in fact, attend a meeting the next day?

A Yes, I did.

Q Concerning Michael?

A Yes, I did.

Q Now, who was present at that meeting?

A My wife and I, Jean Arin, and Richard Cavanaugh.

Q And would you please tell the Court what took place at that meeting?

A At the meeting —

THE COURT: What was the date of that meeting?

MR. ROSENBERG: This is May 25th, 1979.

A Initially, we were introduced to Dick Cavanaugh, and we were told that he had tested Michael, and we were told that he had found serious problems.

Dick Cavanaugh then told us that he found Michael to have severe emotional problems that were interfering with his learning. He told us Michael used distantiation [sic]; that Michael was anxious, [2-120] angry, fearful of death, contemplated or not — dwelled on death, things of this nature. So much so that I asked if he was suicidal or harmful to himself? He told us no, at this time.

I asked if he needed psychiatric help. And he said, not at this time, but he will if his problems aren't corrected.

He scared us, would be the best way to put it. He told us about all these serious things, these emotional problems that interfered with everything that Michael did. He couldn't concentrate because the emotional problems were so bad. He couldn't do anything in school. He couldn't attend to tasks. He couldn't do anything because he was so anxious and so depressed. And he was screwed up.

Excuse me, but that's the only way I can think of, that's what we were told.

MR. BERMAN: I object to "he scared us."

THE COURT: That may go out.

A We then — excuse me. Do you want me to continue the meeting?

Q What took place next?

A After he finished telling us about all the problems with Michael, I asked Mr. Cavanaugh if, you know, what about a reading disability, what about a learning [2-121] disability? You know, what about all the other problems?

And he told us that Michael didn't have any other problems; that Michael's sole problem was emotional. When the emotional was taken care of, Michael would be able to learn.

Jean Arin then told us that she was very concerned about Michael, and that although it's serious, something — not to worry, because Burlington had an excellent program for children with emotional problems. She told us there was a class at the Pine Glen School run by John McAleer. She told us John was an excellent teacher who worked wonders in his class with — this class for emotional children.

She told us that she was going to recommend John — I mean, placing Michael in John McAleer's class. She also told us that she would like to set up a day when we could go up and view the class and bring Michael, so that Michael would meet his teacher next year. And where it was going to be a new school, it wouldn't be so hard for Michael to go there, not knowing the teacher.

This — then we — there was general conversation about everything that had been said. I had asked how they could be so sure that Michael's problems were emotional and not, you know, a learning [2-122] based problem. I said that it would seem to me that any child who was smart, was struggling, was not learning and was having that type of a problem would have to develop emotional problems. They'd almost be a — a logical thing that you would assume that he would.

I asked what came first, the chicken or the egg. And Mr. Cavanaugh said it is an unusual — it is normal that kids with learning problems would develop emotional. But in this case, there's no question. His problems are emotional, they are not

learning, and that's what's causing his problem. And there is no question as to whether one is causing the other, but that the emotional is causing learning.

We talked about it a while longer and Dick Cavanaugh had to excuse himself, he had another engagement.

My wife and I then talked to Jean Arin. We talked at great length about John McAleer's class. She told us about a girl who was in John McAleer's class, a girl who had severe problems, who John had helped, who loved John dearly for his help. And it had gotten so bad that even though now she was able to go to her regular classes, that most subjects she couldn't break herself away from John, she still went back there for reinforcement. That he had this kind [2-123] of an effect on people; that he just worked wonders with them.

Jean Arin told us that she had been trying to get — I'm sorry. The statement here, Dr. Cavanaugh was still there.

Jean Arin told us that she had been — wanted to get Michael out of the Memorial School for over a year. But she couldn't, because that was the school that he was the closest to. She told us that the law prohibited it. She also told us that Michael was in a school where the Principal ruined children who were not achievers. He had no use for a child who could not achieve. And because of him, he wasn't getting his help, he wasn't getting the help, and it was his fault and not theirs that his program had been cut back.

She also told us that if we were ever adversaries in a proceeding, she would lie and say she never told us that. Dick Cavanaugh said he would swear to it. She told us Mike suffered from what they called the Memorial School Syndrome, and it's known all over Burlington. She stated that children in the Memorial School who were not achievers are just not educated or not given the attention they deserved.

[2-124] Mr. Cavanaugh left subsequent to this.

We then talked to Jean Arin some more about the emotional. I, again, asked Jean Arin without Mr. Cavanaugh there if Michael was suicidal or dangerous to himself or anyone else? And she said

she didn't think so at this time. But she thought that his emotional problems should be taken care of immediately in a class like John's.

She told us, just general things, along that line about what a wonderful job Mr. McAleer was doing.

I asked her about his reading, what would John do for reading? And she said he had no need for special reading; that John did teach some academics, but that Michael's problem was emotional, and once it was out of the way, that Michael would go right back, be able to learn and there'd be no problem.

I then told Jean Arin — we were now at a stage where it was something extremely serious with Michael, not just relative to learning, now, and involving maybe physical, danger problems to him, that I couldn't rely on a school test at this stage of the game. I couldn't rely on what Mr. Cavanaugh said, in light of the fact he had told us that the testing situation was not good. And I told her I [2-125] was going to want additional testing, independent testing, done by someone.

I told her I would like a complete, full Core done on Michael, with all the tests done. We then discussed which tests would be necessary, because I had told her that I was a little upset at the testing previously, because Dr. Lott had told us that Michael had been tested to death, and yet the Town of Burlington had tested him on several occasions without our knowledge. So I told her I didn't know what tests he would need. We sat down and tried to figure out what tests would be necessary.

I told her I wanted to get to Dr. Lott and we had an appointment with Dr. Lott a few days hence. Then I asked her if she would please have the psychological report in a typed form so that I could bring it to Dr. Lott. I believe it was or three days after this meeting that we had the appointment, and she said she would try, and then she told us, yes, she would have — make sure that it was written, and we could pick it up to bring to Dr. Lott.

She then recommended that maybe if Dr. Lott couldn't do it, if I wanted a completely independent of everybody, that we could probably go to Dr. Bauman at the Mass. General Hospital. She said [2-126] she would talk to Dr. Bauman. She told us Dr. Bauman was an expert. She would talk and see if Dr. Bauman could arrange the test quickly because she saw how concerned we were.

I said, fine. I told her that Dr. Lott, naturally, at the Mass. General, maybe they could do it together. If they couldn't and Dr. Lott had the time, I would prefer Dr. Lott to do the tests, and I told her I would let her know after talking to Dr. Lott.

Q Did anything else take place at the meeting on May 25th?

A No. That would have been — that was pretty much what took place.

Q Okay.

Now, following the meeting, did you obtain a copy of Dr. Cavanaugh's report?

A Yes, we did.

Q And when did you do that?

A I believe we picked up the report — it would have to have been the Monday following or the Tuesday following. I would say it would have to have been the 28th or 29th of May.

Q In any event, within three or four days?

A After the weekend, yes.

[2-127] Q What did you do with the report?

A After reading it? I read it first and, naturally — I took the report and I and my wife and Michael went to see Dr. Lott.

Q Now, had Michael been — strike that question.

Who is Dr. Lott?

A Dr. Lott, his first name is Ira, is a pediatric neuroiogist in the Mass. General Hospital. We were referred to him from Michael's pediatrician, Melvyn Levine, the Medford Melvyn Levine, at a time when Michael was experiencing severe night

trauma, headaches, and we were referred to Dr. Lott to determine what was causing the headaches and to determine what could be done about a learning disability, which Dr. Levine felt Michael had severe dyslexia. He wanted it documented through another doctor and through a neurologist at the Mass. General Hospital. And he said that if anyone can tell you, Dr. Lott can. He can take care of both things and direct you in the Mass. General which way to go.

MR. BERMAN: Move to strike that Dr. Levine said Michael had severe dyslexia.

THE COURT: Yes.

Q When had Dr. Levine referred you to Dr. Lott? The first time?

[2-128] A I'm just trying to place dates. It was around late fall, early winter of Michael's second grade year. I believe it was probably November of 1978, if that would be the second grade. Pretty — November of 1978.

Second grade, let me leave it as that. His second grade year. I'd have to see the report to know.

Q What grade was Michael in in '78-'79?

A Now, I'm getting — excuse me for just one minute.

'78-'79, Michael was in the third grade. So he was referred to Dr. Lott in November or December of 1977.

Q Okay.

On how many occasions had Michael been seen by Dr. Lott prior to May of 1979?

A I'm not certain on the number. We saw him in November or December of 1978. I would say approximately five or six occasions.

Q Was he also examined or tested by other physicians or other personnel at the Mass. General?

A At what point in time?

Q Prior to May of 1979?

A Yes. And once — he was given the complete — not the brain scan, the sleep, electroencephalogram, I [2-129] believe it's called, by someone. I think he was examined by a colleague at one time of Dr. Lott in the office who was either interning or something of that nature. And then he was examined by numerous, numerous doctors at one time when he was rushed in there through emergency.

Q Now, did you take Michael to visit Dr. Lott sometime in the period after you have gotten Mr. Cavanaugh's report and prior to the June 4th Core Meeting?

A Yes, we did. And as I said earlier, it would have had to have been the 28th or the 29th of May. It was the Monday, Tuesday, maybe even as long as the Wednesday after we had the meeting with Mrs. Arin and Mr. Cavanaugh. I believe it was the 28th, but it could have been the 27th or 29th.

Q Did you show Dr. Lott Mr. Cavanaugh's report?

A Yes, I gave him the report.

Q Did he give you an opinion regarding that report?

MR. BERMAN: I'd like that question answered yes or no, your Honor.

Q Just yes or no.

A Yes, he gave us an opinion.

Q Okay.

Did Dr. Lott make any referrals for Michael at the point of which you were in his office on [2-130] May 28th or 29th of 1979?

A Yes, he made a referral.

Q To whom?

A To Dr. Sherman Eisenthal, the Clinical Psychologist at the Mass. General Hospital, and to Gida Schonfeld, who I believe was the Director of the Learning Disorder Unit at the Mass. General Hospital.

Q And did Michael, in fact, see Dr. Eisenthal?

A Yes, he saw Dr. Eisenthal.

Q Do you know at what point in time he saw him?

A I believe the dates were June 15th and June — it was in June of that year, the 15th and the 27th. I believe it was at two separate times, once taken by me and once taken by my wife.

Q Was Michael also seen or interviewed by Gida Schonfeld?

A No, Michael himself was not seen. I was interviewed by Gida Schonfeld.

Q Now, did you attend the Core Evaluation Meeting on June 4th?

A Yes, I did.

Q Precisely, who else was in attendance?

A My wife and myself, Jean Arin, Myra Fournier, Kathryn Black, John McAleer. I believe Sally Hennessy, and that — I'm pretty sure that was it.

Q Let me go back one moment.

[2-131] The meeting you had on May 25 —

A Yes.

Q — how long did that meeting take place? I mean, over how long a period?

A The May 25th meeting started with — the meeting was at 3 o'clock. It ended probably sometime around a quarter of 5. Yes, it would have had to have been around that time. And I can be certain on that, yes. About quarter of 5.

Q Why are you certain about that?

A Because we rushed home to call Dr. Lott. Right after talking to him. We had an appointment with him and we wanted it extended so that we could sit and talk with him for an additional amount of time because of what we had heard. And we did do that. We did call him and we did get in touch with his office on the need to extent the appointment.

Q Now, the meeting on June 4th, how long was that meeting?

A Probably 45 minutes.

Q And would you please tell her Honor what took place at that meeting?

A The meeting started with Jean Arin talking, and I — because, all of you, everybody here knows each other, and the reason I have John McAleer here is because [2-132] Michael is going to be in John's class next year, and I wanted him to give a presentation on his class.

Jean Arin then proceeded to say Michael had been tested by Dick Cavanaugh and they found that he had severe emotional problems. He was depressed, he was anxious. It was interfering with his learning.

She then said that Michael had been tested by Ms. Meade and Ms. Mason, and that there was a memory problem.

And John McAleer gave a little, brief presentation of his class. The purpose of his class, which was to improve people's self-image. Things of that nature. To build up their confidence. To alleviate their fears.

And then Kathryn Black told us that Michael had not made the progress she had anticipated. In fact, in some areas he had regressed. She said that she read test results she had given Michael, and then she said: I want to make it perfectly clear to all of you, I've already explained this to Mr. and Mrs. Panico, that these tests were done not in conformity to regular testing. There was no time on it. I sat down with Michael and we broke the words down into syllables. We put long and short vowel sounds over them. So this is no indication [2-133] that Michael can read. I was testing him to see if Michael was learning the rules.

Q What else was — what else occurred at that meeting?

A My wife and I stated that we had concerns — I stated. My wife was there. I stated that I had concerns over an emotional — a plan calling for a placement in an emotional class because Dr. Lott told us that he, on the May 27th or 28th day, that he thought the report of Mr. McAleer was ridiculous. I don't — I think he used the word much stronger in that —

MR. BERMAN: I move to strike all of that.

THE COURT: As I understand it, he's telling us what he said at the meeting.

MR. BERMAN: What he said. Oh, all right. Then I move to restrict it so that it is admissible simply for what he said and not for the truth of what he stated.

THE COURT: That's all it's coming in for.

MR. ROSENBERG: That is correct.

MR. BERMAN: Thank you.

Q When you said Mr. McAleer, you did not mean Mr. McAleer's report?

A I'm sorry. Mr. Cavanaugh's report was ridiculous; that he told us that it would be a normal thing for any child with a learning disability to develop [2-134] emotional problems or to have emotional problems; and that he thought this should have been recognized by the psychologist. And that because we had concerns with it, that Dr. Lott had told us that he would send us to a clinical psychologist, which we had set up an appointment. And that I certainly couldn't make any decision on the placement for Michael in a class for emotional children, when the only things I had been told so far are that he did not have emotional problems.

And until I was convinced that he did, and until the doctors told me he did, there would be no way I could accept that kind of a plan.

I also told Jean Arin that I had been looking into the Carroll and the Landmark Schools; that the reason Michael had kept an — Michael and I had not kept an appointment with John McAleer's class was because Dr. Lott had advised us against it, telling us not to take Michael up there at this point in time and confuse him any more.

I told her that Kathryn Black had told us that John McAleer's — I'm sorry, no, I did not tell her that. I'm sorry.

Q Just confine yourself to what occurred at that meeting —

A At that meeting —

[2-135] Q — Mr. Panico, please.

A I'm sorry.

And that was pretty much that we — we expressed great concern over the plan. We questioned Mrs. Arin — my wife and I both questioned Mrs. Arin concerning what was going to be done for his reading; what was going to be done for his learning; not being able to tell time or not knowing right from left and being able to tie his shoes or remember people's names or anything else.

And Jean Arin, again, assured us that there'd be no reason for anything specific because Michael would be getting over his emotional problems and once they were gone, Michael would be able to learn and all this would just — you know.

I then asked Jean Arin if we could have the plan quickly in case anything had come up, because I had started to get familiar at that point with Chapter 766, and I knew if there was a problem, that I wanted to try to get it resolved prior to September of 19 — prior to the next school year, the fourth grade.

Q Following the June 4th meeting, when was it that you received the Individual Educational Plan at issue in this case?

[2-136] A I believe I received it in late June, June 28th, 29th. I believe it was June 28th.

Q Now, between June 4th and June 28th or 9th, did you have any further conversations with Mrs. Arin regarding Michael or the preparation of the plan?

A On June 15th, I called Jean Arin's office, asking for the plan. I had just left Dr. Eisenthal's office. I left a message, she wasn't there, she was to return my call, and I told them I would like an Educational Plan.

On June 27th, I called Jean Arin's office and demanded the plan. She wasn't in. I asked that she call me back. She called me back. I told her that I wanted the plan, I had to have it. And she said she was sorry, that it wasn't ready, that she was

all tied up, the end of the school year and things are very difficult.

And we then — we talked for a few minutes. I told her I wanted the plan because I was contemplating appealing if she was going to insist that Michael stay in John McAleer's classroom for the upcoming year. I told her that I had talked with Dr. Lott. Dr. Eisenthal had tested him. I talked to Gida Schonfeld on several occasions from the Learning Disorder Unit at the Mass. General. I had talked with Kathryn [2-137] Black. Every one of them told me this was not an appropriate placement for Michael. Michael had secondary emotional problems, did not belong in this class.

Kathryn Black — I told her Kathryn Black told me she had taught that class previously, she had been part of putting kids in that class through a Core Meeting, and that that class would destroy Michael. I think she used the words, it would kill him. It would be destructive for him.

Michael needed a total program. I told her that I got this from his neurologist, his pediatrician from the psychologist at the Mass. General, from the Learning Disorder Unit at the Mass. General, and from his teacher. Why are you insisting on this placement?

And she said: I don't agree with the doctors, and that's where I'm going to place him and I'll have the plan for you tomorrow.

MR. BERMAN: Again, your Honor, and I don't think it's really necessary, all of the statements that are hearsay —

THE COURT: Yes.

MR. BERMAN: — restricted, so that they are not admissible for the truth of anything.

Q Now, Mr. Panico, you rejected the Educational Plan [2-138] that was prepared; is that correct?

A Yes, I did.

Q Would you state clearly why you rejected that plan?

A The Educational Plan was rejected for several reasons.

The primary being, that it was a plan for an emotionally disturbed child. We were told that. I had no reason to believe otherwise. We were told that John McAleer was a teacher of children with emotional problems. John McAleer was the function of the classroom.

Doctors had advised against it, so — and psychologists and educators, and I felt I couldn't reject — I couldn't accept it when everybody who knew Mike said he didn't belong in it; when the only teacher who would make a comment about it, said he didn't belong in it; and when the only person who said he did belong there was someone who had never met my son.

Another reason I rejected the plan was that it didn't do anything to address what we now are finding out that Michael had as a problem, which was reading. We used the word dyslexia. I still do. That Michael had a dyslexic problem and a learning disability problem.

All the plan did was that it had good objectives. Most of the objectives were similar objectives that I had in a plan a year and a half [2-139] before, which had failed miserably.

A year and a half earlier, we had received a plan for Michael's reading, which had called for one-to-one tutorial, with supposedly the best LD teacher in the Burlington School System, and now this plan was being cut down to nothing to read. There was nothing in there for reading except that it said that what they would do and that it would be done with John McAleer, but nobody told us how. I didn't know what to expect. Was he going to be reading in a classroom or was he going to be receiving one-to-one tutorial? Nothing. I knew there was no one-to-one because it didn't specify such in the plan. I knew Michael couldn't function, learning to read, with six kids or seven kids or eight kids who were all different, especially children with emotional problems.

So there was nothing there for his reading, nothing spelled out. I had no idea what reading method would be used. I had no way of knowing what they were going to do with him.

There was also the school. I had watched Michael's plan get cut without our knowledge. I had seen other things happen, where we were never notified that he was tested. We were never told of several things. And now I have a plan that was unsigned. [2-140] I looked at my other plan. It was signed by everybody. I now had a plan that was unsigned except for Jean Arin. It wasn't signed by a principal, or it wasn't signed by the people who were supposed to have been at the Core, or it wasn't signed by myself or my wife or anybody who was involved with that meeting. I knew people involved at that meeting did not feel he belonged in that plan.

Another reason I rejected it. I felt that if I — having signed plans, they didn't do what they should, why should I rely on anything that's unsigned?

Prior to rejecting the plan, I contacted —

MR. BERMAN: I'm sorry, your Honor, I pray your Honor's judgment. He's not been asked anything about — he's been asked to give his reasons why he rejected it.

THE COURT: Sustained.

Q Mr. Panico, I'd like you to take a look at the actual plan that we're talking about.

MR. ROSENBERG: Does your Honor have the reference to that? It's Parents' 41.

THE COURT: All right.

Q Would you take a moment to look through the plan and explain to the Court any reasons other than those you've already as to why you rejected the plan?

[2-141] A Prior to rejecting the plan, I sat down and read it in great detail. I looked at it and I found things that were absurdities that were not my son, had nothing to do with my son, and were almost farfetched.

One in particular. And it's on Page 10 of the Educational Plan. on the performance level, what the student can do.

It says: "Michael has a sight vocabulary of at least 200 words."

At that point in time, Michael had a sight vocabulary, at tops, maybe five words. He could read his name, mom and dad. He couldn't even read the word "exit," or "men" or "women" on a bathroom. He had regressed unbelievably and he could read nothing.

That was not Michael and had nothing to do with Michael.

"He can recognize and divide multisyllabic words in words in written form."

Michael couldn't write. He couldn't spell. He had trouble with "in" and "out," as far as writing. He certainly couldn't recognize them in a written passage.

"He can use prefixes" — which goes on and on, "and suffixes," neither of which he could do.

Then it said: "Michael is able to skim [2-142] reading passages to locate details and overview ideas. He is able to understand" — I'm sorry — "and overview an idea."

Michael couldn't skim a word. A sentence as simple as "The dog ran," it might take him two or three minutes, and it might come out that the cat ran, or that the dog walked.

He could skim nothing. He couldn't read. He had no conception of words. He wouldn't even attempt it. He just couldn't do it. I mean, it's not even — it wasn't even at all possible at that point in time. It had nothing.

"Michael knows the vowel combinations, a-y, a-i, c-e, o-u, et cetera."

At that time, Michael didn't know them. If he saw them, that it was an "a" and a "y," he might call it a "b" and a "y," or a "c" and a "y."

It just wasn't Michael.

There was another thing that said, under — on Page 12 of the plan, "Support Services Provided."

And it says: "All special subject areas will be informed of Michael, Michael's particular learning style."

I didn't know what they were talking about. We were told Michael would be with John McAleer for the [2-143] entire day.

I was trying to figure who the Special Teachers were. There was nobody mentioned in the plan. I couldn't understand why it was in there.

One of the things they said the plan was based on was its prior assessments.

To us, the most key person to Michael at that point in time was Kathryn Black. She had taken an interest in him, who told us so many times how much he wanted to read, and what effort he was making and yet unable to accomplish. And she told us he didn't belong in the plan. The plan, in her words, the plan could kill him.

There was another thing that was stated, which was: "A multisensory approach to reading with much repetition and drill to compensate for the visual-memory integration problem would be helpful."

There's nothing in the plan which says how they're going to do it. They told us there was no — at the meeting, that there was no reading. And, yet, this is in the plan. They told us there was no reading problem. Strictly emotional.

In general, the plan didn't seem to be signed. It didn't reflect what I thought Michael was. It didn't tell us what they were going to do for Michael. [2-144] And it was completely opposite of the best medical, educational, and maybe parental input that I had, and I rejected it.

THE COURT: Why don't we suspend, here, until Monday.

[Transcript of a portion of the trial held on May 17, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes the remainder of the testimony of Mr. Robert Panico, a witness called by the Defendant Doe, found at Transcript Volume III, pages 3-3 to 3-85, and reproduced in the Record Appendix, Volume II, pages 3-3 to 3-85.]

[3-3] ROBERT A. PANICO, Resumed

Continued Direct Examination by Mr. Rosenberg

THE COURT: You understand that you're still under oath?

THE WITNESS: Yes, your Honor.

THE COURT: Go ahead, Mr. Rosenberg.

MR. ROSENBERG: Thank you.

May I have Exhibit 4, please? The report of Dr. Kinsbourne, dated May 27th, 1981.

Q Mr. Panico, I'd like to direct your attention to Page 3 of Exhibit 4, please. Do you see the sentence following the phrase, "transported by bus" in the first paragraph?

A Yes.

Q Would you please read that sentence to the Court?

A "At lunch he would throw food and eat off of other children's plates."

Q Now, Mr. Panico, have you ever observed your son throwing food?

A Never.

Q Have you ever observed your son eating off of anyone's [3-4] plate?

A Never.

Q Did any teacher or other official from the Burlington School System ever tell you that Michael had either thrown food or eaten off of other children's plates?

A No, they have not.

Q Did you ever see that reported in any report that you were given?

A Never.

Q Now, later in that paragraph, there is a phrase — excuse me, a sentence beginning with the word "Consequently." Could you read that sentence to the Court, please?

A "Consequently, his attempts to make and keep friends tended to be unsuccessful. At 'Magic Circle,' no one wanted to sit next to him and he was not invited to other children's parties."

Q Did Michael have difficulty making friends?

A Absolutely not. That was probably his strong suit.

Q Okay.

Did anyone ever report to you, either teachers or any other officials in the Burlington Schools, that Michael had difficulty making friends or was not invited to other people's parties?

A Never. Michael, if anything, was almost constantly [3-5] at parties. He's always had a lot of friends. He still has friends from the Memorial School that he went to school with that he's still friendly with, and he hasn't gone to school with them for three years. Children not in the neighborhood. He's always had a lot of friends and he's had the same friends for a long period of time.

Q Did you ever see any written report from the Burlington Schools which indicated that Michael neither made friends nor was invited to children's parties?

A Never.

Q Now, I would like to direct your attention to the period of June 1979.

Would you please tell the Court your observations of Michael's ability to tell time at that point in time?

A He couldn't tell time, even to the hour. He had absolutely no conception of time.

Q Did you make any observations of Michael's ability to do —

THE COURT: Wait a minute.

He couldn't tell time or he had no conception of time?

THE WITNESS: Both, your Honor. He completely, an hour or a minute, there was no differentiating [3-6] between the two to Michael.

THE COURT: In terms of looking at the clock?

THE WITNESS: Both ways. In terms of looking at the clock or in Michael's own mind. If you said we'll do something in five minutes, or we'll do it in an hour, there was no differentiation. All he knew was it was later. He had no conception of whether it was five hours later, how it would relate to five minutes. None whatever.

Q Did you make any observations at that time about Michael's ability to do mathematics?

A Yes, I did.

Q What were those observations?

A Michael could add and subtract on his fingers. If he had a math problem in front of him, provided it were a single column, a problem like five and six, five plus six, he could do it if he could use his fingers. The same with subtraction, if it were nine, take away four, he could do it using his fingers, if somebody told him what the sign was.

Often he would subtract when he should add or add when he should subtract. He couldn't carry numbers at that stage unless someone was sitting with him to explain to him: Now, you've got nine and you're carrying the one over, put it up here. [3-7] And he could do any math using his fingers, but that was the extent of it. He had no concept of carrying or anything like that.

Q Did he multiply or divide?

A Absolutely not.

Q Did you make any observations of Michael with respect to his ability to differentiate between left and right at that point in time?

A Yes. We had observed Michael for four years trying to tell the difference between his right and his left or front and back. It was so obvious that Michael plays hockey and was a left wing, and he played for three or four years to that point in time. And he had to be the last person on the ice, because

he was a right wing and didn't know where to go. He used to wait until everyone else lined up, and then would go to his position. He had — not that he didn't know them, he just couldn't differentiate them. He knew there was a right and he knew there was a left. But he would confuse them constantly.

Q How about with respect to up and down? Did you make any observations of Michael's ability in that regard?

A Michael constantly reversed them. Michael would be talking about something upstairs for his bedroom and he would be talking about his being downstairs. [3-8] My bedroom downstairs. Or he would talk about a game that would be down in the cellar, and he would talk about it as being: We're going to play upstairs or we're going to do something up and down.

Front, back, up, down, right, left, were always reversed. It was a constant problem for Michael.

Q Now, in the spring, or more precisely, in the May to June 1979 period, Mr. Panico, did you make any observations of Michael's overall emotional state?

A Yes.

Q What were those observations?

A In the spring of '79, Michael was extremely frustrated. That would probably be the best word I could use. He was questioning his worth. He'd asked us on several instances if he was retarded. He knew he couldn't learn and he couldn't understand why. He was — depressed probably wouldn't be the correct word. I don't think he had ever gotten that far. He was down on himself. He had an extremely poor self-image. He felt he was useless. It was just a constant questioning of his worth at that point in time.

Q Did you make any observations, Mr. Panico, of Michael's overall behavior outside the school environment at that point in time?

A At that point in time, Michael started to almost [3-9] withdraw from people, from the kids. He was — again, it

goes back to his questioning of his worth. He was always wondering what was wrong with him. Why he would talk to the kids and they'd get upset with him. He'd say, when we did something yesterday, and they'd call him a liar, and he was talking about something that happened two weeks ago or three weeks ago. But everything was yesterday.

He would confuse people's names. When he'd be talking about a friend, something they did, and he'd call, talk about H.D., who was a friend, and he didn't mean it, he meant his brother. And it was coming to a point where the confusion was making Michael withdraw. He was just not sure of anything. He was completely unsure of himself to the point he didn't know whether he wanted to bother with the kids or what he wanted to do at that point in time.

Also, he was starting to get — the headaches were brutal at that point in time for him, and he was constantly with headaches. We tried medications. Constantly sick with headaches. They're probably the worst stretch at that point in time.

Q For how long a period had Michael been suffering from headaches, Mr. Panico?

A Suffering and having them. I think Michael [3-10] has probably had headaches since about five or six years old, getting progressively worse until early in 1977, I believe. The start of the second grade, in the fall of that year, they became very, very bad. They eased in the spring of his second-grade year through the summer, and early into the fall of the third-grade year, which would be '78-'79. After '79, after Christmas, early in '79, the headaches became very, very bad again. Through the end of the third grade and into part of the summer, they were at a stage where it was every day. Michael, I don't think, had a day without a headache. Vomiting, nausea constantly, laying down, always with hot towels on his head. They eased up, again, in the fall of 1979.

THE COURT: Hot towels on his head?

THE WITNESS: Yes, constantly, your Honor.

Q Did Michael have any drugs or other medication prescribed for his headaches?

A Michael has had numerous drugs. From Dr. Lott, from the first time we went to Dr. Lott on a referral from Dr. Levine — that's the Medford Dr. Levine — Michael was put on — was diagnosed with severe juvenile migraine, and he started on medications. I don't recall the name. There was one medication that he carried, maybe, for three or four months. That was [3-11] unsuccessful. We switched to another medication, which was unsuccessful. To another one, and I think he's tried numerous. They put him on numerous medications. He's taken Fiorinal and aspirin for the pain, and that's pretty regular. I carry it, Michael carries it. He carries it with him even now — I'm sorry, he doesn't carry it with him anymore.

He has been off medication for the headaches because they have eased considerably since the point in time.

Q Now, Mr. Panico, you enrolled Michael in the Carroll School in the fall of 1970; is that correct?

A Yes, it is.

Q When did you first learn about the Carroll School?

A It would have been May 18th, 1979, at a Core Meeting.

Q And how did you learn about the Carroll School?

A At the May 18th Core Meeting, which I had explained previously when they had told us about his memory, Michael wasn't making progress, et cetera, one of the teachers, and I'm not certain which, said that we should look into a total program, and one of the names of the school that came up, was the Carroll, another one was the Landmark.

Q Now, I'd like to direct your attention, Mr. Panico, [3-12] to the May-June period of the next year; that is, May-June 1980.

A Yes.

Q Michael had been at the Carroll School during that entire period?

A Yes, he had. One year.

Q Would you please give the Court your observations of Michael's ability to read and write and spell at that point in time?

MR. BERMAN: Objection, your Honor.

I don't think he's qualified.

THE COURT: I've got to check my notes.

[Pause.]

THE COURT: Why is this not relevant to the appropriate relief of subsequent years?

MR. BERMAN: Oh, I think the question is very relevant. I don't think Mr. Panico is the person who can answer it.

THE COURT: He can tell us his observations concerning his son. He cannot make any diagnoses, but he can certainly tell us what he observed; can he not?

MR. BERMAN: Well, all right. Precisely what he observed, but not in generalities, because . . .

Q Would you answer the questions with the limitations [3-13] places on it, Mr. Panico?

A In the May-June period, 1980, Michael's self-esteem had increased —

MR. BERMAN: I pray your Honor's judgment.

THE COURT: Tell us what you saw about Michael. That is, without drawing conclusions as to what it meant, tell us how he behaved and what you saw about him.

A Michael was playing with his friends again. He was happier. He was doing homework. He was reading words off of newpapers. He would read words off of trucks as we passed them, read words off of road signs. He was reading sentences haltingly, but reading them. He was able to do math without somebody telling whether it was addition or subtraction. He was able to identify the sign. He was able to carry numbers in addition. He was able to substract numbers which were uneven, et cetera.

Michael's headaches were lessened, were less than they had been in the past. Michael was able to write sentences. He wrote it phonetically, but he was able to write it. The grammar was not good, but it was written so that it could be understood. He could convey an idea in a sentence. He had learned a little bit of things other than — about the city [3-14] and his country, a little bit in geography, a little in social studies. The first time Michael had, you know, learned anything. He was excited about it.

Q Did you make any observations about Michael's ability to tell left from right, up from down, forward from backward, at this point in time, which is the May-June 1980?

A Yes. At that point, Michael was consistently able to differentiate between right and left. He could tell time to, maybe, within fifteen minutes. He could say it was 3:45, count them on the clock and say 3:45 or 4 o'clock. He couldn't look at a clock and tell you what time it was quickly, but he could figure out the time on the clock.

He had no problem with up and down. And that was the most absolute change. That one was completely squared away with him.

He now had a conception of what, though not a good one, of — you know, if you said a few hours as compared to a few minutes, Michael realized that there was a time, a time lag.

His right and left was almost a constant, but he still on occasion would confuse it.

Q Did you do homework lessons with Michael at this point in time?

[3-15] A I sat with him while he did them on many times, yes.

Q Has this been true during the entire period of that year, '79-'80?

A Through, '79-'80, and all the time subsequent while he's been at the Carroll.

Q Now, I'd like to direct your attention to the spring of the following year; that is, May-June 1981.

Had Michael been at the Carroll School during that year, as well?

A Yes, he had.

Q Okay.

And would you please describe to the Court your observations, Mr. Panico, of Michael's ability to do reading, writing and mathematics at that point in time?

A Michael, at the May-June '81 period, was able at this point, and was reading small paragraphs. He was writing sentences with a little more clarity. He was starting to be able to convey an idea in writing or to express an idea orally.

The confusing of constantly changing people's names or places was diminishing. "Yesterday," everything wasn't yesterday. He could now say last week, or last year. He would confuse it on occasion, but he would — he was now starting to become oriented in [3-16] time. He was able to tell time pretty well, just looking at a clock. He would be able to say it was five minutes of nine. He would, you know, be off on occasion; but, pretty much, he had his time down very well. He was able to — he had a good grasp of multiplication, although he had an inordinate amount of time memorizing the tables. He was devising his own system, where he would multiply the way he saw it. Three times six, he would take six, you know, twice twelve and add six. But he was able — he knew the concept, and he was able to do multiplication. He was very well — very good at this point in time with addition and subtraction. Again, you know, he would have lapses where a sign might be a confusion, but very minimally at that point in time.

Q Did you observe him adding and subtracting more than single digits?

A Yes, I did.

Q At this point in time?

A Yes, I did.

Q Now, as of the spring of 1981, Mr. Panico, did Michael continue to have headaches?

A Yes, he did. But from — if I might, from the period of about all of '80-'81, '81-'82, Michael's headaches, he will have an occasional bad headache. He has them [3-17] regularly. But nowhere — they're not crippling him now. By that, I mean they're not immobilizing him, that he can't do anything. He's learned to live with them and he's functioning very well with them. But he's had them throughout that period, but to a — they're not as severe, and to a lesser degree than he did, prior to, let's say, around December, the fall of 1979. They have gotten progressively better. They have been constant in the last year and a half or two years.

Q Now, you testified earlier that Michael had had a series of medications prescribed by — I believe you said it was Dr. Lott?

A Yes, that is correct.

Q Have any medications been prescribed for Michael's headaches in the year '80-'81?

A I am not sure exactly when it stopped. Michael has been off of medication since about October or November of 1980. In the second year at the Carroll School, he was taken off medication at that point in time for the headaches.

Q Did you make any observations, Mr. Panico, of Michael in the spring of 1981 with regard to his overall emotional state?

A Yes.

[3-18] Q And what were those?

A Michael was a much happier child at the end of '81. At the end May of '81, June of '81, he had come to a point where he accepted and would talk about his learning disability. He could kind of joke about it when he'd make a mistake. And when he'd see something upside down, if it were a picture, he'd

call it a dyslexic picture. He accepted it. He learned to accept his headaches; that he could admit to somebody that he had one.

He would tell the kids in the neighborhood that he went to a private school because he had a learning disability. That was probably the first time he had ever let anyone know, including — he wouldn't even tell his grandparents. No one was supposed to — although they knew he would never talk about it. At this point he was able to talk about it. He knew that he was struggling. He knew that he had a problem and he knew he had to do something to overcome it. And he felt he was.

He was a much happier child in '81 than he'd ever been since the first grade.

Q Now, Mr. Panico, Michael has been at the Carroll School through the present; is that correct?

A That is correct.

[3-19] Q Would you please — focusing your attention on the present time, would you please describe for the Court your observations of your son, Michael, at present, with respect to his ability, first, to read, write, spell, do mathematics?

A Michael's reading has improved, to me, immensely. Michael is able to sit down and read — it's a book called "Reading For Concepts," which is from the school. He is able to sit down and read the paragraph or paragraphs, and answer questions concerning the paragraph with — answer them correctly. He reads much better to himself or gets a much better — more out of it, more comprehension reading to himself than he does orally.

Q How do you know that?

A Because he's read to me orally and he's read to himself. He's also done the stories both ways, orally and to himself. And when he reads orally, he just does not get as much out of it as he does when he's reading to himself. He doesn't have anywhere near as much accuracy in answering the questions.

MR. BERMAN: Move to strike that.

THE COURT: It's an observation.

MR. BERMAN: Yes. I don't think he's — but I don't think this witness is in a position to [3-20] make that kind of statement.

THE COURT: It's an observation, Mr. Berman. He says that the child has read to him, and explained his comprehension. He has also read to himself, and explained more comprehension.

MR. BERMAN: Well, all right.

THE WITNESS: If I might, there's answers at the end of these — questions at the end of these stories. And both ways, I —

THE COURT: I understand.

Q Have you made any observations of Michael's ability to spell right at the present time?

A Michael's spelling is pretty good at the present time. When I — pretty good, it's pretty good for Michael. Certain words are spelled phonetically, and certain words like "when," will be spelled on many occasions, if he's rushing, w-e-n.

But most words which can be sound out, Michael can spell fairly well. A lot of learned words — or certainly not — "learned" isn't the right thing. Words with the long "i" or an "e" on the end, if know what he's doing, Michael can spell them.

Michael can write and has written some excellent — when I say "excellent," excellent to me.

[3-21] Q Have you read his papers?

A Yes, I have. He's written stories for school, which he's brought home. He's able to put thoughts down on paper, for the first time. Actually, a concept or an idea. It might be simple, but he's able to write about it and put it down on paper and write a couple of paragraphs about it.

Q Have you observed Michael doing any mathematics work?

A Yes, I have. Michael has been doing fractions. He, naturally, continues to do the addition and subtraction. He does it very well. He's done fractions. He's done word problems. Simple word problems. He's now able to — reading the word problem, he still has trouble with them. But this is the first time Michael's ever been able to do math out of a word problem. He's always had a lot of trouble with abstracts. Unless it was just concrete, something in front of him was concrete, he's now able to read or have it read to him and then able to do the problem and know that it should be addition or it should be multiplication, things of that nature.

Q Does Michael do division?

A Yes. Yes, he does.

Q Have you observed him doing long division?

A He's done short and long division, yes.

[3-22] Q Have you observed him doing multiplication?

A Yes, I have.

Q Does Michael still, at this point in time — let me rephrase that.

Have you made any observations of Michael with respect to his directional abilities?

A His directional abilities right now are, I would say he's 100 percent accurate.

THE COURT: You mean, left, right?

THE WITNESS: Left, right, up and down.

Directional — even north and south at this point. He's learned things of that nature. He's consistent with his directional now.

Q Mr. Panico, have you made any observations of how Michael's overall emotional status at this point in time?

A Michael is happy. He is not the least bit frustrated. He's eager. He's extremely eager to learn, where Michael will now sit down on his own and read a book, take a book out of the library. It's going to take him an inordinate amount of time to

read it, a very simple book, but he does it on his own, not a part of homework, and not as part of something I give him to do. He'll take it, he'll go with his sister to the library and he'll take out a simple book. He's [3-23] happy. He feels challenged. He now realizes, for the first time, that he really can learn things, he's learned things, he knows things about places, about things, history, geography, which he's learned, and it's giving him confidence, where he now feels that there's nothing wrong with him. He now feels that he has a chance to learn. He knows he has to struggle. We talk, and we talk about it all the time.

And he'll talk about it. He'll say: I know it's hard. I know I'm going to have a hard time doing it, but I can do it. He now has a real drive to accomplish and to learn.

MR. ROSENBERG: I have no further questions, your Honor.

THE COURT: Mr. Berman.

Do you have any questions, Ms. Janos?

MS. JANOS: No.

THE COURT: Mr. Berman.

MR. BERMAN: Thank you.

Your Honor, before I begin my questioning of this witness, I'm going to ask the Court to take judicial notice of Paper 131 in this case. I'm not interested so much in the paper itself, as in the letters that are attached to that paper, which are letters from Mr. Gallagher to me and me to Mr. Gallagher [3-24] with respect to a review.

THE COURT: Wait a minute.

These are papers — the 131 refers to the docket numbers in this case?

MR. BERMAN: That's right. It is the docket number of the paper as it will be reflected on the docket number.

I also, I think, perhaps — your Honor asked for Dr. Kinsbourne's curriculum vitae. I believe it is part of the papers filed in this Court, but I have one in —

THE CLERK: It's in evidence.

MR. ROSENBERG: It's Exhibit —

THE COURT: It's now in evidence.

THE CLERK: It's in evidence. It's Exhibit 3.

MR. BERMAN: Thank you.

Finally, there was a question with respect to a Rule 34 notice and the response thereto, which I asked the Court to notice. I note the Rule 34 notice and the response of the Defendant, Department of Education, thereto, are, indeed, apparently filed with the Court, and they are part of the record appendix on appeal. I have not been able to find a docket number among our papers corresponding to them.

[3-25] THE COURT: Do you know when it was filed?

MR. BERMAN: Yes, I do.

The Rule 34 notice was filed on March 29th, 1980. And the response was dated September 2nd, 1980.

THE COURT: March 29, 1980?

MR. BERMAN: Yes.

THE COURT: It's not even on the docket.

MR. BERMAN: I know. I can't find a docket equivalency for it. And yet I do know, I know it's docketed because I have a docketed sheet.

THE COURT: When was the response?

MR. BERMAN: The response is dated September 2nd, 1980. And for that, I — again, it was duly served and filed, but I don't have a docket entry to reflect it.

THE COURT: Why don't we mark them as exhibits? Offer them as exhibits. That way we'll put them into the papers, at least as of now.

Do you have copies of them? Because if they're not docketed, I'm not likely to have copies of them in my file.

MR. BERMAN: Would it be all right, your Honor, if I simply tore them out of the record appendix and gave the Court the record appendix?

THE COURT: Well, rather than tearing it [3-26] up, why don't you make xeroxes of them and file them later?

MR. BERMAN: All right. Good enough.

THE COURT: We'll mark them as Exhibits 5 and 6.

MS. JANOS: May Mr. Berman describe what they are, please, your Honor?

MR. BERMAN: Yes, certainly.

THE COURT: Does the copy you have, show the Clerk's stamp on them as having been received?

MR. BERMAN: Yes.

THE COURT: The Clerk of the District Court?

MR. BERMAN: Yes.

MR. ROSENBERG: Your Honor, I just want to make sure I understand. Is Exhibit 5 —

THE COURT: Exhibit 5 would be the request for production of documents under Rule 34, is it?

MR. BERMAN: Yes.

MR. ROSENBERG: Addressed to the State?

MR. BERMAN: Addressed to the State, yes.

MR. ROSENBERG: That's Exhibit 5, correct?

MR. BERMAN: And the response —

THE COURT: So it's the Town's request to the State, correct?

MR. BERMAN: That's correct.

[3-27] MS. JANOS: Could Mr. Berman read what the request specifically relates to, please?

THE COURT: Well, wait a minute.

THE CLERK: And 6 is the response?

THE COURT: 6 is the response.

Are you offering the entire document or only portions of it?

MR. BERMAN: The entire document. It's a very short document.

And the response is equally short.

THE COURT: So the request will be Exhibit 5, and Exhibit 6 is the State's response?

MR. BERMAN: That's correct.

THE COURT: All right.

[Request for production of documents marked Plaintiffs' Exhibit No. 5 in evidence.]

[Response to request for production of documents marked Plaintiffs' Exhibit No. 6 in evidence.]

THE COURT: Now, you want to read them into the record?

MR. BERMAN: If your Honor wishes, I'll be more than glad to.

THE COURT: I don't wish.

You wish.

[3-28] MS. JANOS: I would like to, your Honor. I think it's irrelevant. I think what that notice to produce would be the Department of Education to produce all notices to the Town in terms of the issues that were going to be raised at the Administrative Hearing. Something which I think you have made a determination is not relevant to these proceedings.

I don't think either the notice to produce or the State Defendant's response is relevant to the issues here at this hearing.

MR. BERMAN: It would, at the very least, be relevant to the question of why certain evidence wasn't offered at the —

THE COURT: Oh, I'll take it, if necessary, de bene.

So why don't you — do you insist on it being read?

MS. JANOS: No. That's fine.

THE COURT: All right.

When you get the xerox copies, please give them to the Clerk so they can be marked.

MR. BERMAN: Thank you.

MR. ROSENBERG: Your Honor, may I understand, is there another exhibit which had something to do with Paper No. 131?

[3-29] MR. BERMAN: Yes.

MR. ROSENBERG: I didn't understand that.

MR. BERMAN: Yes. I'm simply asking the Court to take judicial notice of Paper 131.

THE COURT: All right.

Now, do you have any questions of the witness?

MR. BERMAN: I do, your Honor.

Cross-Examination by Mr. Berman

Q Have you ever been a witness in a court prior to today?

A Yes.

Q How many times, Mr. Panico?

A Numerous times. I'm not certain of the number. Ten, fifteen, maybe twenty.

Q And when did you first meet Jean Arin, please?

A The first — would you like a differentiation between meeting her personally or orally on the phone?

Q All right.

When did you first speak to her on the telephone?

A It was around June 3rd, 1977, I believe it was, right near the end of grade one, provided I've got the years correct. Yes. It would have been around June 3rd, [3-30] 1977.

Q And when did you first meet her in person?

A I would think a couple of weeks later at a Core Meeting, at the end of grade one. I believe that was the first time I actually met her.

Q And between that date and May 25th, 1977, about how many times had you met Jean Arin?

A I had never met her prior to May 25th, 1977.

Q I'm sorry. May 25th, 1979, please.

A How many times did I talk to Jean Arin or how many times did I talk to her personally?

Q How many times had you met her personally in that period?

THE COURT: From 1977 to 1979?

MR. BERMAN: That's correct.

A Probably a half a dozen times.

Q And you had spoken with her on the phone many more times; isn't that correct?

A Yes, I have.

Q And you had told Mrs. Arin what you did for a living; isn't that correct?

A I don't think I ever told Mrs. Arin what I did, at all. I think I told the — I told the Social Worker who came to the home. I don't believe I ever told Mrs. Arin what I did for a living. We might have [3-31] discussed — I honestly don't — I don't believe — I had no reason to.

Q You will agree with me that you had told representatives of the Town of Burlington that you were a Senior Criminal Investigator for the Internal Revenue Service; is that correct?

A Not to my knowledge, no.

Q Did you ever tell that to the Social Worker when the home assessment was made?

A I believe I must have, yes.

Q All right.

Now, on March 24th, 1979, Michael came home from school visibly upset; is that correct?

A I was not there. That's what my wife told me on the phone, yes.

Q Your wife called you and told you that Michael had come home very upset?

A No. I called my wife and she told me that Mike had just come home, not very upset, but he was upset. Yes, he was upset.

THE COURT: Did you say March 24th?

MR. BERMAN: May 24th. May 24th, it should be. I said March 24th, but it should be May 24th.

THE WITNESS: And I did answer for May 24th, your Honor.

[3-32] Q Did you speak to Mrs. Arin after you spoke to your wife or before you spoke to your wife?

A Before I spoke to my wife.

Q Did you speak to her again, afterwards?

A No, I did not.

Q As a matter of fact, when you spoke to Mrs. Arin, you demanded that she meet with you that day; isn't that correct?

A I didn't demand. I asked her if we could meet that day because of the severity that she had explained to me of the problem.

Q And did you express some displeasure to her when she said she couldn't meet with you that day, sir?

A I don't think so. I probably said — I might have. That, I don't know. I don't see why I would have. But I could have, yes. I could have been upset at the time. I don't know.

Q Well, as a matter of fact, when you came home that evening, was Michael still upset?

A In a manner of speaking, how I'm using the word, he wasn't very upset. Yes, he was upset. He told me about it. So I would say he was — that he had missed recess or lunch with his friends and he had to go into kindergarten or the first grade, I forget which, but he had to go with the little kids.

[3-33] Q As a matter of fact, Mr. Panico, from early in the spring of 1979 onwards, Michael was continually exhibiting emotional behavior; isn't that correct?

A What you're talking on emotional behavior: When he's happy, he's emotional; and when he's sad, he's emotional.

If you could define it, I could probably answer your question.

Q Well —

A Michael had — excuse me, if I might. Mike —

THE COURT: Wait a minute. There is no question at the moment, Mr. Panico.

Q Directing your attention, first of all, to — starting in April of 1979 or a little earlier, did Michael indicate in the morning that he didn't want to go to school?

A You mean, emotional that way? Absolutely.

Q Did he start crying about it in the morning?

A Yes, he did.

Q Did he start developing bad migraine headaches?

A Absolutely.

Q Did he start vomiting?

A Yes.

Q Did he regularly wake up during the night, on a regular basis, crying?

A I believe at that point in time, on a regular basis, he did, yes, and it wasn't a one-night thing. Yes, [3-34] he did.

Q Did he mumble and ramble incoherently?

A I don't think at that time he did. He was having — he was waking. He was having nightmares. But I don't think at that stage in time he was — I think that was a year or so earlier, in the second-grade year, when he was having those problems when he couldn't be awakened. If that's what you mean? On that, I'm not quite certain.

Q I direct your attention, if I may, to Page 31 of the transcript of the Hearing before the Hearing Officer.

I'm going to ask you if you will read the question, the first question that appears on that page, sir?

A "All night" —

THE COURT: Does this purport to be a transcript of this witness's testimony —

MR. BERMAN: Yes, your Honor.

THE COURT: — before the Hearing Examiner?

MR. BERMAN: Yes, your Honor.

A "Question: All right.

"Now, I invite your attention to May of 1979. Did you and your wife become concerned about Michael?"

Q And would you read your answer, please?

[3-35] A "Yes. In May of 1979, probably started April or maybe even a little earlier. I don't know. Michael started regressing. His reading, when he would read with us and he tried to read a word, it seemed a little worse than it had been. I think it was back where it was sometime in the first grade. He couldn't read. He wouldn't read. He didn't want to go to school. He used to wake up in the morning and cry about not going to school. He started to develop — he started developing bad headaches again. When I say 'bad,' I mean he has — he has migraines, but they run bad. He had very, very bad headaches, again, with vomiting. He started waking up, now, during the night on a regular basis, crying. He would come into our bed. Something that Mike has never done since he was a baby. He would cry in the night and just mumble and ramble incoherently. We became very concerned about him at this point in time."

Q Thank you. Thank you, Mr. Panico.

As a matter of fact, Mr. Panico, when you went to the meeting with Mrs. Arin and Mr. Cavanaugh on May 25th, 1979, you were of the opinion that Michael had a severe emotional problem, weren't you?

A No, I was not.

Q It's not your opinion at the time?

[3-36] A Not that he had a severe emotional problem.

Q Did you consider that he had any emotional problem?

A Yes. I felt that Michael had some emotional problems at that point in time. Would be — I might use the word "emotional" to cover a wide range of areas. Again, it would depend on how you're using emotional.

Q In your opinion, you had a child that was exhibiting certain behavior, you yourself testified to at the Hearing; is that correct?

A Yes, it is.

Q And had you testified, now that you've had a chance to read your testimony, correctly at that hearing?

A I read that testimony, yes.

Q And was what you said true?

A It was true, yes, when I said it. I said, now, I don't recall if he had done it at that point in time. At that time, evidently, I did recall. And it seems as though Michael did ramble and mumble in bed with us. Yes.

Q And, as a matter of fact, Mr. Panico, wouldn't you agree that a child who was exhibiting the kind of behavior that you testified to today and testified to on September 10, 1979, was in fact a child who had a severe emotional problem?

A No, I would not.

[3-37] Q You wouldn't.

Isn't it a fact, Mr. Panico, that when you went to the meeting with Jean Arin and Richard Cavanaugh, you were the person who repeatedly referred to Michael's emotional problems?

A I certainly used the word, but I was talking to a psychologist. And if I said, I said: Does Michael have emotional problems? How severe are his emotional problems? What are his emotional problems?

I certainly didn't make a diagnosis that Michael had a severe emotional problem.

Q I'm not asking you, sir, whether you made a diagnosis.

THE COURT: I think he's answered your questions.

MR. BERMAN: Thank you.

Q Now, when you went to this meeting, sir, with Mr. Cavanaugh and Mrs. Arin, did Mr. Cavanaugh appear to you to be reading from a paper when he spoke to you?

A No, he wasn't reading from a paper. If anything, he might have had notes. I don't recall. But he absolutely was not reading. In other words, he wasn't reading a report to us at all. It was a conversation.

Q And you never recalled, in the course of his discussions [3-38] with you, he read from his notes?

A I said he might have had notes which he referred to. He absolutely did not read from them.

Q Did you make any notes, sir, yourself, of your meeting with Mrs. Arin and Mr. Cavanaugh on May 25th?

A Yes, I did. I made notes while we were talking.

Q Did you keep those notes?

A I did.

Q Do you have them today?

A I don't have them with me. No.

Q Was Mrs. Panico present?

A Yes, she was.

Q The entire time of the May 25th meeting?

A Yes, she was.

Q And you definitely recall, sir, that at that May 25th meeting, Mrs. Arin said to you and Mr. Cavanaugh said to you, in the presence of your wife, that this child had been ruined by Memorial School, hurt by Mr. Barows, but that if she had to say it in court, she would testify falsely?

A I can tell you what her exact words were, if you'd like them?

Q Give them to us, please, sir.

A Mrs. Arin, said that she was going to tell us something about the Memorial School and Mike's being there. [3-39] And then she said, "If we ever become adversaries, sitting across the table, I'll deny I ever said it."

And then Mr. Cavanaugh said, "I will swear to it."

Q On August 1st, 1979, you made an agreement to enroll Michael in the Carroll School; is that right?

A I can't — I can't answer that without a little bit of clarification because, although I sent them a check for $200, I talked to Allan Forsythe at the school, explaining my financial situation at the time, telling him I did not have the money that they wanted at that point in time. It would entail a loan. Could I send him $200, I believe it was $200, and if Michael was going to that school, and I would make a decision before September, I would send the money they need. I would get the loan. And if not, then I would understand the $200 would be gone.

But I would say, yes, I enrolled him at that point in time.

Q Did you sign a contract?

A I did sign one. I don't know if it was August 1st.

Q Do you remember that you had a conversation with Mr. Michael on about August 1st, 1979?

A Yes, I had a conversation with Mr. Michael, in or around that period of time.

[3-40] THE COURT: Who is Mr. Michael?

MR. BERMAN: The Superintendent of Schools.

THE COURT: He was a witness?

MR. BERMAN: Yes.

Q And didn't you, as a matter of fact, tell Mr. Michael in that conversation that you had made a decision to enroll Michael in the Carroll School?

A Absolutely not. I'm emphatic on that point.

I told Mr. Michael that I was contemplating enrolling Michael, my Michael. I asked for a meeting so we could discuss it, because I explained my financial situation. I wanted the matter resolved prior to having to make a financial commitment. I never told him that we had enrolled Michael in the school. I might have told him we were thinking about it, but I told him I wanted the issue resolved so that I would have a decision prior to September, when I had to make a decision as to whether or not to outlay that money to send my son to school.

Q Well, as a matter of fact, didn't Mr. Michael tell you in that phone conversation that if you enrolled your son in the Carroll School, you would pay for it?

A Not at all. Mr. Michael told me that if I made a decision, the decision was mine. If I put Michael [3-41] in the Carroll School, I would have to pay for it, but he assured me: If we're going to a hearing and you win, the Town will abide by the hearing and we will pay for the education, and you will be reimbursed.

Q Did you testify to your conversation with Mr. Michael before the Hearing Officer?

A I'm certain I did.

THE COURT: Are you offering this to impeach the witness or for the truth of what the Town intended to do or said it intended to do?

MR. BERMAN: I'm offering it for both, your Honor, because I'm going to, when I dig into it, show that the witness testified to his conversation with Mr. Michael on August 1st, of 1979. And I'm prepared to show that in that conversation, all he had Mr. Michael say to him was that if you take the child out of — put your child in the Carroll School, you will pay for it.

THE COURT: Well, how can that bind Mr. Panico to agree to pay forever, even though he may have had legal rights to change that? Namely, this lawsuit.

MR. BERMAN: I'm not suggesting that it binds Mr. Panico forever.

THE COURT: Or get the Town off the hook?

[3-42] MR. BERMAN: I am suggesting — yes.

THE COURT: If the Town is on the hook?

MR. BERMAN: Yes. I am suggesting, however, that under the construction given to Title 20 of the United States Code, Section 1415(e)(3) —

THE COURT: In Stemple?

MR. BERMAN: Yes. In Stemple.

— that he was informed at that time that if he put the child in the Carroll School, it would be at his expense. At least, if he did it without the Town's permission.

THE COURT: Well, he's agreed to that.

As I understood the testimony, he said that Mr. Michael told him that it was his decision; that he would have to pay for it. Of course, there was a hearing coming up and the Town would abide by the result of the hearing.

Isn't that what you said?

THE WITNESS: Yes, your Honor.

Q Now, you had a meeting at the Memorial School on May 18th, 1979; is that correct?

A Yes, it is.

Q And at that meeting, various people made certain representation; is that correct?

A We had a — we had a meeting, representations, [3-43] discussions. Certain things were stated, yes.

Q Someone said, at that meeting, that Michael had a memory problem; is that right?

A Absolutely.

Q Who said that, please?

A I believe it was both Ms. Meade and Ms. Mason. I had never met them before. Other than the fact we had faced them many times since then, I now can differentiate between the two. I didn't know who was who at the time, and I can't tell you which said what.

Q And at that same meeting, you recall, sir, that a person said to you: "We cut Michael's reading time with Mrs. Black in half and we did it without your consent"?

A Not quite that way.

And they didn't say — I know who said that, and certainly she didn't say it "with Mrs. Black," she was Mrs. Black.

As far as the time being cut, it was said by Mrs. Black and she said: That we — or Michael's time had been cut in half, or words to that effect, and it was kept from you. You didn't know about it. You weren't told about it. And I never told you.

The exact words of that, I don't recall.

[3-44] But that one was Mrs. Black, absolutely.

Q Mrs. Black told you that she had kept it from you; is that it?

A No. Mrs. Black told me it had been kept from me. Mrs. Black had said that she never mentioned it. That it had been kept from me. She was never asked. She was an employee.

And she pretty much, you know, gave us the inference that I am an employee and doing what I'm told. And that's the inference I drew in the way she explained it.

Q Never mind your opinion, sir.

She never told you, did she, that no one had ever told you about the time being cut in half?

A Oh, yes. She said it —

Q Well, Mrs. Black wouldn't know, would she — strike the question.

Somebody also told you at this meeting of 5/18/79, if I remember correctly, that you had been given false progress reports; that you had been told that Michael was making progress when, in fact, he was not.

Would you tell me who said that to you?

A No one said we were given false progress reports.

We were told that Michael was not progressing [3-45] the way we had been told, the way we had been led to believe. No one said: You had been given false reports. Michael has not progressed the way we expected. Michael has not made the progress.

And it was almost: We're sorry that he hadn't been; that you weren't aware of it.

It wasn't anyone said: False reports.

Q Did someone say words to you to this effect, as you testified Friday in court: Michael has not been making the progress that you were told he was making?

A I would say that would be correct.

Q All right.

A Not the exact words. That is a summation of what was said to us. Yes.

Q Who told you that?

A I don't recall. I believe it could have been either Ms. Meade or Ms. Mason. It could have been Kathryn Black. It could have been Myra Fournier.

I am not sure. I would tend to think that it was probably Kathryn Black.

Q Kathryn Black said to you, in effect, at this meeting, that she had been telling you that Michael had been making progress that he wasn't, in fact, making.

Is that right, sir?

A No, it is not.

[3-46] Q No, it isn't right?

A No.

Q She never said anything like that; isn't that correct?

A Well, she said — if you will, Kathryn Black told us that Michael was not making the progress that we had been led to believe that he was making. Or words to that effect.

She did not say she kept it from us. She did not say who kept it from us. That we had been led to believe, or — words. It did not come out as though someone lied to us and gave us a sheet of paper saying: He is 99 percent here, but he's only 40, and we're saying it's 99.

It never came that way. It came out that Michael, we were not being told of Michael's true progress. It looked better than it was. How the exact or what the exact words were, I don't recall. But it certainly came across to me that Michael was not making progress that we were led to believe he was making.

Q And you think Kathryn Black said that to you; is that right?

A I believe it was said by Kathryn Black. And I think it was agreed to. It was talked about.

Q You think the other people said that that was true: [3-47] That Michael was not making the progress that you had been led to believe that he was making; isn't that right, sir?

A I didn't say anyone else said it. I said it was talked about, his lack of progress. Not that they said and went along that there were reports, or there were anything else. His lack of progress was discussed.

Q Mr. Panico, isn't it a fact, sir, that all you were told at that meeting was that Michael had not made the progress that Mrs. Black had hoped he would make; is that right, sir?

A That was said, but there was other. No, sir, that is not all that we were told.

Q Now, you also were at a meeting of June 4th, 1971; is that correct — yes, June 4th — I'm sorry. June 4th, 1979.

A Yes.

Q And at that meeting, someone said, is that correct, that Michael has a severe emotional problem?

A I don't believe anyone at the June 4th meeting really said it that way.

Jean Arin said that Michael had been tested by Mr. Cavanaugh and had emotional problems, severe emotional problems. Whatever the terminology was. That Michael had emotional problems, and that's what [3-48] was said. I don't think it really came up at that point that it was severe emotional problems.

Q You don't think the word "severe" was used; is that correct?

A It might have been. I'm not exactly 100 percent certain. It's been over three years, I believe. And I'm not certain if the word "severe" was used at that point in time. It probably was.

Q And, in fact, this was entirely consistent with your opinion at that time; that Michael had an emotional problem?

A No. The School's concern or the School's explanation of Michael's emotional problems was far different than what mine is. And I think I tried to explain before what my interpretation of an emotional problem is. It is not a psychological term, per se.

The School's made it very specific what Michael's emotional problems were. And they were not what I felt they were.

Q I'm going to direct your attention, please, to Page 213 of the transcript before the Hearing Officer, Line No. 13, and I'll ask you to read the question, sir, at that page in the transcript, and your answer to it, please.

A Line No.?

[3-49] Q 13, please.

A 13?

Q Yes.

A "Do you think Michael had emotional problems, sir, during the year 1979?"

Q What was your answer, please?

A The answer is "Yes" to that question.

Q Thank you.

Now, someone at the meeting of June 4th, 1979, also said that Mr. McAleer's class was for — and I'm reading your exact words —"emotional children."

Do you remember testifying to that on Friday?

A I — no, I don't remember testifying to it.

But, yes, I'm certain that was stated at the meeting.

Q Who stated that, please?

A I believe it was Jean Arin.

Q Did Mrs. Arin, at the meeting of June 4th, 1979, read Mr. Cavanaugh's report?

A She did not. She read, maybe, an excerpt or a note she had. But she absolutely did not read his report.

Q Did you read the report at the meeting?

A No, I did not.

Q Was the report available for you to read?

[3-50] A For me to read? I think I had already had a copy.

Was it at the meeting? I have no idea.

Q You had a copy prior to the meeting; is that correct?

A Absolutely.

Q And had you read it prior to the meeting?

A I sure had.

Q Was there any statement in that report that Michael had a severe emotional problem?

A I would have to see the report. Whether it said he had a severe emotional problem in the report or not, I don't know.

Q You don't remember what the report —

A I don't remember whether that word is actually in the report or not. No, I do not.

Q Do you remember whether there was any statement in the report that Michael had a primary emotional problem?

A I don't know, again, if that is or not in the report.

In the written report, you're not talking about the oral, the written report?

Q That's correct.

A I honestly don't know. Again, I'd have to read the report. I don't know if the word "primary" is used or not.

Q Now, on —

THE COURT: I gather this report is part [3-51] of the transcript?

MR. BERMAN: It is, indeed, your Honor.

It's one of the exhibits.

MR. ROSENBERG: It's Parents' Exhibit 40.

THE COURT: Go ahead.

Q Now, Mr. Panico, on June 27th or 8th of 1979, you picked up an IEP from Mrs. Arin; is that correct?

A I believe my wife picked it up.

Q You got it and you read it, is that right, on that —

A Yes, I did.

Q — date or those dates?

Did you read it 25 times, sir?

A I read it numerous times. I don't know if were 25, 20 or 30. But I know I read it at least, at least — let's put it this way, more than 15 times. I read it and read it and read it.

Q Do you remember telling the Hearing Officer you read it 25 times, sir?

A I very well might have. I don't know if I said I read it 25. I might have said I read it approximately 25. I don't think I would have put a specific number of times on it. I could have, but I don't think I did.

Q And you rejected that plan; is that correct?

A Yes, I did.

[3-52] Q Before you rejected the plan, did you show the plan to Dr. Levine? Dr. Melvyn Levine of Medford?

A Prior to rejecting it? No, I did not.

Q Did you show it to Dr. Lott?

A Excuse me, for one moment.

Do you mean, when showing, actually show them the physical plan or discuss it with them?

Q Showing them the plan?

A No, I did not.

Q Did you show it to Dr. Eisenthal?

A No, I did not. I didn't have it.

Q Did you show it to Kathryn Black?

A No, I did not.

Q It's a fact, isn't it, that at the time you rejected that plan, you had not shown it to any of the medical consultants whom you had consulted with respect to Michael's condition?

A The actual paper plan, I had not.

Q Now, Mr. Panico, you agree with me that you have had not formal training whatsoever in teaching children with learning disabilities?

A That's correct.

Q And you've had no formal training in the teaching of reading?

A That's correct.

[3-53] Q And you've had no formal training in diagnosing children with learning disabilities?

A Correct.

Q And you've had no formal training in ameliorating the problems of children with learning disabilities?

A Correct.

Q Now, you have testified, I believe, to the reasons why you rejected this plan; is that correct, sir?

A Are you talking today or are you talking at the Hearing?

Q Both at the Hearing and Friday?

A I did.

Q And it would be fair to say, isn't it, that one of the reasons that you rejected this plan was that you were angry because the Town had, in your opinion, cut Michael's time with Mrs. Black in half without consulting you, and had done certain testing without consulting you; is that right?

A Not at all. That's not the reason the plan was rejected.

Q I didn't say that.

That's one of the reasons; isn't that right?

A No. That in and of itself, that certainly was the premises for one of the things that I used to reject the plan, which was, at this stage of the thing, after what had happened, after the violations that had been [3-54] incurred, after cutting Michael's plan, after ignoring the diagnosis of dyslexia, I had no more faith. I now received a plan that was unsigned; people were supposedly at the meeting who weren't even there; the Principal hadn't signed the plan; the Superintendent hadn't signed it. I received a piece of paper that was thrown together in one day because they were late.

Yes, that was one of the reasons I rejected the plan.

Q Oh, I beg your pardon, Mr. Panico.

The fact that the plan wasn't signed was a very important thing to you, wasn't it, sir?

A It was awful important at that point in time. It was signed by other than Jean Arin. Yes. It was not signed by the Principal of the School.

Q I see.

Did you ever receive unsigned plans from the Carroll School, sir?

A Absolutely.

Q And that didn't bother you at all, did it, sir?

A Not at all. Because it was not the same situation. They had never cut anything. I was not on a commitment with them. It was not a — a plan was not even required from the Carroll School. The plan was done just for my benefit and Michael's, and it wasn't a requirement [3-55] that had to be followed.

A [*sic*] You said to yourself at that time, when you got the plan from the Carroll School: In my knowledge of the law, this isn't a required plan and I don't care whether it's signed or not. But that plan they gave me in Burlington, that was an unsigned plan and I would reject it for that reason.

Is that correct, sir?

A I don't think I said that I would reject the plan because it were unsigned. I said that was one of the things of the Burlington plan that concerned me, it was not signed. I had a signed plan, which was cut, after assurances from Mr. Foley, after assurances from the Town of Burlington that the plan would not be cut. It was cut. And that was a signed plan.

I now had one unsigned by even the School Principal. I had no faith in it at that point in time. It was certainly one of the things I looked at. No question.

Q Mr. Panico, did you ever ask anyone to sign the plan?

A I tried to sit down with the Town of Burlington —

Q No, no. Mr. Panico.

A — on numerous occasions for that purpose and to discuss the plan.

Q Did you ask anyone to sign the plan?

[3-56] A No, I didn't ask them to sign the plan.

Q Now, another reason I believe you testified to for rejecting the plan, sir, was that Mrs. Black told you that if Michael was placed in John McAleer's class, that would destroy him; is that right?

A That was absolutely said. That was one of the reasons I rejected it. The word "destroyed" might not be the correct word. It might have been "kill." It might have been "kill him." It might have been "ruined." It was a word similar to destroy or something of the same meaning.

Q Mrs. Black testified at the Hearing before the Hearing Officer; is that correct?

A Yes, she did.

Q And she is not going to testify at this hearing; isn't that right?

A I don't think so, no.

Q And, as a matter of fact, you were present the whole time Mrs. Black testified, weren't you?

A Yes, I was.

Q And, as a matter of fact, sir, you wrote out or told Mr. Gallagher what questions to put to her, didn't you?

A No, I did not. I might have written out a question for her, or a couple of questions. I certainly didn't [3-57] prepare his questions. I did not prepare the witness.

I wasn't even present, I don't believe, when he did prepare the witness.

Q Did you ever hear Mrs. Black testify at the Hearing that putting Michael in John McAleer's class would ruin him, kill him or destroy him?

A Testify at the Hearing? No, I did not.

Q Did you ever hear her tesify at the Hearing that she had told you words to that effect?

A No. And I do not believe she was ever asked that question or anything similar.

Q Did you testify at the Hearing as for your reasons for rejecting the plan?

A Yes, I did.

Q And did you tell the Hearing Officer, sir, at that Hearing, that one of the reasons you were rejecting the plan was that Kathryn Black had told you that putting Michael in Mr. McAleer's class would ruin, kill or destroy him?

A I believe I did. Yes.

Q Well, sir, I'm going to give you an opportunity to review your testimony and see if you can find where you said that.

A If you would give me the transcript, I would be very happy to.

[3-58] THE COURT: Do you want him to look for it?

MR. BERMAN: It's not there. But I would certainly give him an opportunity to look for it.

I have many more questions between now and recess, so that. . .

THE COURT: All right.

Q Did you ever tell, prior to August 1st, 1979, any person connected with the Burlington School System that you were rejecting this plan because it was not properly signed?

A I never told anyone I was rejecting it because it was not properly signed.

Q Now, you were also concerned, Mr. Panico, because in your opinion this plan failed to indicate how Michael would acquire the skills that he was supposed to acquire thereunder; is that correct?

A Certain of the skills, yes. I was. I was concerned over that. Yes.

Q And, in fact, you rejected the plan because you felt that it didn't explain how these skills were going to be imparted; is that right?

A If I might, Mr. Berman, I didn't reject the plan for any one of the specific reasons. You're asking me: Did I reject it for that reason? No, I didn't.

[3-59] Was I concerned with that thing in the plan? Yes, I was.

That was one of the things that went into my decision to reject the plan.

Q Mr. Panico, I didn't ask you if this was the reason, I asked you if this was a reason.

Was it a reason why you rejected the plan?

A It was one of the things that went into my decision. Absolutely.

Q And you told her Honor that on Friday; isn't that so?

A I believe I did.

Q Now, then, Mr. Panico, did you ever go to Mrs. Arin or go to anyone in the Burlington School System and ask how they were going to implement this plan?

A I had been told how they were going to implement it very clearly. With no reservations. I was told it on May 25th. I was told it on June 4th. They were going to implement a plan for a child with emotional problems. He had no reading disability. I was told that. He had no learning disability. I was told that. I was told that Michael would be treated for emotional problems. When he got over his emotional problems, he would learn to read on his own. He did not need special training. My wife and I were both [3-60] told that on two separate occasions.

Q Come on, Mr. Panico. You know you read the plan 25 times; isn't that right?

A Absolutely.

Q And after you read it 25 times, Mr. Panico, you didn't know how the School System was planning to implement the objectives of the plan; isn't that right?

A No, it's not correct.

Q You knew how the School System was going to implement the objectives in the plan; is that correct?

A The objectives of the plan changed, Mr. Berman, from the time it was given to me to the time of the Hearing. When it was given to me, it was a plan for an emotional child, which is the way I addressed it, the reason I rejected it, and we walked into that hearing expecting that to be the issue. It came out about a reading disability at that hearing, from the Town's point of view, it was now a class for reading. My answers were answers to questions. There were a number of reasons why that plan was rejected.

Q Excuse me, Mr. Panico, I think you're going way —

MR. BERMAN: I pray your Honor's judgment. I think this is going way beyond the scope.

THE COURT: What's the next question?

Q Mr. Panico, did you know, when you got the plan, how [3-61] the Town was planning to implement it?

A How they were going to implement a plan that I received on June 27th, yes.

Q Are you trying to tell this Court that you got two different plans? That there was a plan that was given to you on June 27th, and then another plan was substituted at the Hearing?

A The written plan remained the same. The plans were absolutely different.

Q The written plan was absolutely the same, wasn't it, at all times, sir?

A Yes, it was.

Q And you looked, you read the objectives of the plan 25 times, or something like that; is that right, sir?

A I read the objectives, whatever the number of times was. It might have been 25. Somewhere well over 15, yes.

Q And you testified here on Friday, didn't you, that you didn't know how those objectives would be implemented?

A That's correct.

Q Now, I'm asking you: Did you ever go to anyone, Mrs. Arin, or anyone else, and say: How do you plan to implement these objectives? Did you go to a person and ask the question?

A I tried to, sir.

[3-62] Q Well, how did you — did you actually ever go to — let's start with Mrs. Arin.

You knew she had drawn the plan; isn't that correct?

A Yes, I did.

Q Well, from June 28th to August 1st, did you ever call Mrs. Arin on the telephone and say: Mrs. Arin, I've read your plan and I do not understand, with respect to the first ten objectives, how you're going to implement it.

Did you do that, sir?

A No, I did not.

Q Did you try to call Mrs. Arin to ask that question?

A Mrs. Arin, specifically, no.

Q Did you try to call John McAleer between June 28th and August 1st and ask him how he was going to implement the plan?

A I did call John McAleer. I don't know if it was between — I believe it was in July, prior to August 1, yes.

Q Did you ask Mr. McAleer how he taught reading?

A I asked him if he taught reading. I know that, but I didn't ask him how he taught reading. No, sir, I did not.

Q What did Mr. McAleer tell you when you asked him if he taught reading?

[3-63] A I'd have to put it in the context of the conversation to answer that. I don't think it was a — if I could give you a specific answer to just that one question.

Q You can't tell me whether Mr. McAleer answered your question or didn't answer your question?

A There were a series of questions put to him at the same time. It wasn't just that one specific issue that I asked him.

Q One of the questions you put to him, sir, was: Do you teach reading? Is that correct?

A Not as a specific question.

Q You didn't put that question to him?

A It was in the context of many other questions.

In other words, it was maybe a rambling question or a group of questions. But there was an answer that came about as a result of the questions.

Q Did John McAleer tell you whether or not he taught reading?

A I can't answer that question.

[Pause.]

Q You testified that you didn't go to Mr. McAleer's class on June 2nd because you'd been advised by a Dr. Lott not to take Michael to that class; is that correct?

A That's correct.

[3-64] Q Did you go to that class by yourself, sir?

A At what point in time?

Q On June 2nd?

A No, I did not.

Q You understood perfectly well that you could go by yourself, didn't you? That you weren't required to bring Michael with you?

A I — when the appointment was set up, the thing was set up, was to bring Michael to meet his teacher and for me to observe the class, I didn't bring Michael and I didn't go. No, I did not.

Q And you didn't go to him —

A I apparently assumed I could have gone, yes.

Q Now, another reason I believe you gave for rejecting the plan was that there were certain statements on Page 12 concerning Michael's reading ability that you considered to be erroneous; is that correct?

A I'd have to see the page. I'm not certain what page number.

Q Well —

A There were certain things in the plan.

THE COURT: The one that gives 200 words and you felt he only had five.

THE WITNESS: That certainly was erroneous.

Q Did you ever call Mrs. Arin and ask her where she [3-65] got that information?

A No, I did not?

Q Did you ever point out to her that you considered the information false?

A Again —

Q Erroneous? Strike the word "false."

A Again, at what point in time?

Q All right.

Between June 28th, 1979, and August 1st, 1979?

A No, I did not.

Q Calling your attention to the summer of 1980, did you become aware, during the course of that summer, that the Town had requested the opportunity to reevaluate your son?

A I never took it that way, no. I knew there was a request to reevaluate Michael. I did not feel that it was ever a request of the Town of Burlington to reevaluate Michael. It didn't come that way.

THE COURT: I don't understand that.

THE WITNESS: The —

THE COURT: You said you knew there was a request but you knew there wasn't a request?

THE WITNESS: There was a written request, your Honor, to me at one point, and I believe it was [3-66] the summer, which was 766 Core request. It was sent out for me to sign certain forms, et cetera, and to get in touch with the person whose name was on there if I had questions, which I called Jean Arin's office three times, and she wasn't in to back to me. I received a letter in response to my letter, which I wrote to the Town, and I received a response from Mr. Berman, saying: I am representing the Town in litigation — and he responded to it — and we'll use if for whatever lawful purpose we wish to test him.

So when I'm saying I don't believe it was a request by the Town to evaluate Michael for an educational plan, I believe there was a request to reevaluate Michael for use in the judicial proceedings.

Q Did you ever ask whether or not this was a — as a matter of fact, sir, you received the same forms you had received in the past, when a reevaluation was requested; is that not correct?

A I had never received forms for a reevaluation, ever. I had received forms, part of the forms, one time, and only one time. And that was in June of 1977. I did not receive them the subsequent time he had a Core. And I received them, again, in the summer of 1980, I believe.

Q But these were the same forms you had received [3-67] in June of 1977, for the most part, weren't they?

A There was a lot more in these than there were in the last ones. Yes, sir.

Q But, nevertheless, they were basically the same forms? For all the same assessments; isn't that right?

A I don't think they were the same assessment requests. I'm not sure on that. The assessments, they were similar ones. I don't believe all the assessments — that, I couldn't answer without seeing both requests. There might have been different assessments, different tests to be done.

Q And, sir, you made a decision at that time you would not make your son available; is that correct?

MS. JANOS: Objection, your Honor.

THE COURT: I think we're getting into the areas that I said I would not hear; are we not?

MR. BERMAN: No, I'm not getting into the question of what the progress would have been if he had —

THE COURT: Well, nor into the conduct of the parties concerning evaluations as bearing on what is appropriate for this child.

MR. BERMAN: Well, your Honor, I will represent to the Court that there will be testimony that it is impossible for a Town to devise a program for a [3-68] child without —

THE COURT: That is why the burden is on the parents to show what the appropriate placement would have been for the years subsequent to 1979, 1980.

MR. BERMAN: I understand, your Honor.

But we have to, assuming they make some kind of showing, which I don't know whether they will or not, that the Carroll School was an appropriate placement.

THE COURT: Why don't you wait for rebuttal?

MR. BERMAN: Fine. I suppose Mr. Panico will be here. I could call him on this point then.

THE COURT: Why don't we take a recess, now, and I'll see counsel on the other case.

[Recess.]

Q Mr. Panico, I believe it was your testimony that John McAleer at the Core Evaluation Meeting of June 4th, 1979, did not discuss his reading program; is that correct?

A He definitely didn't discuss his reading program.

He — I'm sorry. He did say he taught reading. But I mean he did not discuss any specific program or anything else. When the question was asked, he said: Yes, I teach reading and academics.

[3-69] That was it.

Q So that the sum total of Mr. McAleer's discussion of his program on June 4th, 1979, was to say, "I teach reading and academics," period. He didn't elaborate. He didn't explain. Is that right?

A I don't believe that's the question you asked me. You asked me if he discussed his reading program. Mr. McAleer had a lot to say at that meeting. But about reading, that was the extent of it.

Q I'm asking you about reading, specifically, sir.

A That's all he —

Q All he said was, "I teach it." He didn't elaborate or explain; is that right, sir?

A Absolutely.

Q Now, in June of 1977, you received a packet of material, did you not, from the —

THE COURT: '77?

MR. BERMAN: Yes, June of 1977.

Q — from the Town of Burlington for a Core Evaluation; is that correct?

A Yes, we did.

Q And one of the — this packet of materials called for a medical evaluation; is that right?

A Yes, it did.

Q And, as a matter of fact, you arranged to have a [3-70] medical evaluation performed by the person who had been Michael's pediatrician from birth, didn't you, sir?

A I didn't arrange that. I — I did and I didn't.

We were told it had to be his pediatrician. We were told to take this, he had to have a medical exam, bring this to his pediatrician.

Q And you did just that?

A Yes, I did.

Q Did you, in June of 1977, ask who would pay for that examination? —

A I never asked because I assumed we had to.

Q Now, sometime in 1978, did Dr. Levine refer Michael to Dr. Lott?

A I don't believe it was 1978.

Q When was it, sir?

A It was the — late fall, early winter of the second grade. I believe it was 1977. I believe it was sometime around November of 1977. It definitely was the second grade.

Q So it would have been late '77 or early '78; is that correct?

A It was late — it wasn't early '78. The referral was made — would have been made in '77, if that was the second meeting.

[3-71] Q Can you tell me what the purpose of this referral was, please?

A I'm sorry?

Q Strike the question.

A The purpose —

Q Dr. Levine referred Michael to Dr. Lott because Michael was suffering from severe headaches and had other symptoms; is that right?

A He referred him to Dr. Lott for two reasons. No. 1, he felt Michael had juvenile migraine, but he wanted him to go to a neurologist. No. 2, he thought Michael had a rather severe learning problem. He called it dyslexia. And he felt that Dr. Lott could confirm that at the Mass. General Hospital, also.

Q And that was not part of any Core Evaluation, was it, sir?

A Oh, no, it was not.

Q And at the time that examination was performed, you never asked the School Department to reimburse you for the cost of it, did you?

A I never knew I could ask them.

Q Did you ask them, sir?

A No, I did not.

Q Now, in 1979, Mrs. Arin was about to arrange, at the School Committee's expense, to have Michael examined [3-72] by Dr. Bauman; is that correct?

A No. She was not going to arrange it. There was a conversation at that point that I wanted additional testing done, and she suggested that maybe it might be independent. I didn't know what we wanted. We sat down and went over some of the tests. She made a suggestion that maybe she could get Dr. Bauman. I said: Fine, why don't you try to set it up. I would prefer Dr. Lott, whom I would be seeing. If he can do it, I'd rather he do it.

But, yes, as far as it goes — no, it wasn't that way. It was a discussion and Dr. Bauman's name did come up, and she might — I think it's a she — would coordinate testing.

Q And at some time you were told, were you not, that in fact it had been set up with Dr. Bauman; weren't you, sir?

A I think we were told after we had told her to cancel; that she had already had it set up, yes. But we had Dr. Lott.

Q And you said you would have Dr. Lott do it; isn't that right?

A I would have Dr. Lott? No. Dr. Lott would coordinate it. The School had agreed to have Dr. Lott coordinate it.

[3-73] Q Did you say that you wanted Dr. Lott to perform the testing and coordination function, sir?

A I'm sorry. Dr. Lott to perform the testing?

Q And coordination functions that Dr. Bauman would have performed if he had gone forward with Dr. Bauman?

A I said I would prefer Dr. Lott, absolutely. Yes.

Q Now, there were some home assessments done in 1977; isn't that correct, sir?

A Yes, there was one.

Q Did you read those home assessments?

A Yes.

[Pause.]

Q Were you interviewed in connection with the home assessment?

A Yes.

Q Was your wife interviewed?

A Yes, she was.

Q I'm going to call your attention to the home assessment, Summary of Home Assessment, Michael Panico, 28 Fieldstone Drive. And I'm going to ask you to look at this paper, ask you if you've ever seen it before today?

A Yes, I have.

MR. ROSENBERG: Excuse me. May I know what exhibit you're referring to, Mr. Berman, please?

MR. BERMAN: Right.

[3-74] I am referring to S-3C.

THE COURT: That is one of these in the packet?

MR. BERMAN: It should be one of that — part of that packet. Yes, your Honor. I can't vouch that it is, because I didn't file it. But it should be.

MS. JANOS: It is, your Honor. It should be at the beginning of the School exhibits, or at the beginning.

May I just ask, your Honor, if you have a list, a summary of exhibits at the beginning of that packet? About a six-page, seven-page list? It's entitled Certificate of Record.

THE COURT: Yes.

MS. JANOS: Okay. That lists all the exhibits that are exhibits.

Q Would you please the material, sir: "Reaction to illness, accidents, hospitalizations, and any acute or chronic handicapped conditions"?

A "Since infancy, he has been bronchial and is often congested. He has occasional headaches with vomiting, possibly migraine. Age one, fell in crib, stitches in his mouth. Age three, fell in livingroom, stitches near his eye. Age five, stitches for cut mouth. [3-75] Last year, fell off bike, and had

concussion. Plus a few other falls. Then he had X-rays. He has never been hospitalized."

Q Mr. Panico —

THE COURT: Excuse me, Mr. Berman. What is the number of that exhibit, please?

MR. BERMAN: S-3C.

Q And you first saw that, sir, back in June of 1977; is that correct?

A I don't recall when I first saw it. I don't think I saw it until well after the — I think it might have been July. I was mailed the assessments. I had not seen them until — they were mailed after June 6th.

Q Well, in June or July of 1977?

A Pretty sure it was in July.

Q And did you ever make any effort to correct any of the information —

A No.

Q — that you just read?

Did your son ever go on any field trips by bus while he was a Memorial School?

A I don't think so. There could have been one. I don't think there was any more. The reason I can state that is my wife was an aide at that school and went [3-76] on just about every field trip Michael went on as their driver, and Michael was always with her. She took the car. I think there might have been one by bus.

Q Mr. Panico, isn't it a fact that after the first bused field trip that Michael took, the School Authorities requested that Michael not go on any further field trips unless accompanied by one of his parents?

A Absolutely not. Never.

Q Never said that?

A Never.

Q Now, one of your problems with the evaluation that you were given in 1977 was that — strike that — in '79, was it showed Michael as having a much larger sight vocabulary and much more reading skill than in your opinion he really had; is that right?

A That was one of the things, yes.

Q Mr. Panico, did you ever tell Michael's first-grade teacher that Michael was reading from the Boston Globe? With you, of course?

A I don't know how I could have. No.

Q You don't remember saying that?

A No, I certainly don't.

Q Did you ever have a psychological report sent home during Michael's second grade, sent home with him [3-77] by the School?

A During the second grade?

Q During the second grade. Yes. Yes, sir.

A I don't believe I ever did. It's possible, but I'm not certain. No I'm certain there was no psychological report. Absolutely not.

If we're talking the same context of report, there never was one.

Q I would like to direct your attention, please, to Page 43 of the Hearing Officer's transcript.

MR. BERMAN: And I might like to show P-19 to the witness, if you have it there, Mr. Rosenberg.

MR. ROSENBERG: Sure.

This is Parents' Exhibit 19?

MR. BERMAN: That's right.

THE COURT: What's the question?

Q Does this refresh your recollection, sir, that there was a psychological report sent home with Michael while Michael was in the second grade?

A No. 1, I don't — I didn't — if this is it, I did not consider this a psychological report. It's a progress report. Quarterly report. I was referring to something like Mr. Cavanaugh had, or something to that nature.

I'm sorry. This — if you want to call it [3-78] a psychological report, I absolutely received this. No question.

Q Well, did you refer to it as a pyschological report in your testimony before the Hearing Officer, sir?

A I — yes, I did. I —

Q Would —

A "Potentially damaging as a psychological report." Yes.

Q Would you please read the testimony that you gave, starting at Line 14?

A If I could, I don't know what preceded it, though. I don't know if I referred to it or somebody else referred to it first. And I just used the same words. I can't answer that.

THE COURT: Mr. Panico, you have able counsel who can correct any misimpression that may be created.

I ask that you, please, just answer the question.

A "No. I am very concerned about sending home with a child something that is potentially damaging as a psychological report. It could get lost by, read by anybody in the neighborhood, or the child or anybody else. It could be read by Michael. He could have it read, or somebody read it to him. I think that could be extremely damaging to my son and my family, if they were. This isn't the thing you want to publish [3-79] in the newspapers or let everybody know."

Q As a matter of fact, sir, you've indicated, at the Hearing before the Hearing Office, that you were concerned that Michael might read that report himself; is that correct?

A I said it, yes.

Q All right.

Incidentally, during the recess, you've had an opportunity to see whether or not you had ever made a statement when you

testified before the Hearing Officer that Kathryn Black had told you that placing Michael in John McAleer's class would destroy, kill or ruin him, or some words to that effect.

Were you able to look at your testimony to see if there was such —

A A part of it, I was able to look at. Yes.

Q Did you find anything like that, sir?

A I found something referencing it, that the words on a question asked by you: Did you hear Kathryn Black say it would destroy him? I think that was the terminology. And I said: No, I don't think she — it's over there, on the page, and I know what the page number is, I could read it for you.

MR. ROSENBERG: Your Honor, we have not completed our review of the entire transcript, and —

[3-80] THE COURT: I understand that.

MR. ROSENBERG: Do you want to read this, what we've found, and may pertain to the. . .

MR. BERMAN: I'm perfectly willing to read it. It's entirely consistent to the fact that he never heard her say it.

THE COURT: Well, without your interpretation of what he says, if you want to read it, go ahead. If you want to reference it, that's fine, too.

MR. BERMAN: No, not particularly.

THE COURT: If you want to do nothing with it, that's even better.

MR. BERMAN: I wiil do nothing with it, your Honor.

Q Do you continue to carry medication with you for Michael's headaches when you're out with Michael?

A I do.

Q When did Michael cease to carry that medication?

A He was carrying aspirin, oh, I would say, he'd keep a couple, we'd given them to him and he'd put them in his pocket, up through — I think he stopped over last summer.

Q Now, I believe you testified this morning that at one of the Core Meetings a teacher suggested that Michael be enrolled in a total program at the Landmark [3-81] or the Carroll School.

Is that correct, sir?

A I don't believe that's what I testified to. I think I said a teacher recommended that he be placed in a total program, and the Carroll and Landmark Schools were mentioned either there or right after the meeting.

Q All right.

A In a total program.

Q At which Core Meeting would that take place?

A That was the 5/18/79 meeting.

Q And which person said that?

A I don't recall.

Q The Carroll School, sir, as far as you know, is exclusively a school for children with reading disabilities; is that right?

A Reading disabilities?

Q Yes.

A I think that's the main focus of its curriculum, yes. I'm not certain that it's 100 percent that way. I don't know that for a fact.

Q Did you testify this morning that right now your son is not the least bit frustrated with his school work?

A I don't know if I testified to that this morning.

If you want me to answer. . .

Q Is he the least bit frustrated?

[3-82] A He gets frustrated. Absolutely. If he's trying to do things, he gets frustrated, trying to do school work. Yes.

I was using "frustrated" in a lot of different ways, and he does get frustrated if he makes a mistake. Yes, if he finds something very hard to do.

Q Do you personally understand, Mr. Panico, that the purpose of aid to the handicapped children is to enable these children to return to a real-life setting?

MR. ROSENBERG: Objection, your Honor, if that's calling for a legal conclusion?

THE COURT: No, he's asking for his state of mind. I'll allow it as to that, for whatever relevance it may have.

MR. ROSENBERG: Okay.

A Do I think the focus of it? I don't think that's the focus of the law. I have read the law quite a few times. To be the focus is to help the handicapped, and in a least restrictive atmosphere that you can — you know, that there's an appropriate program.

THE COURT: Help them to what?

THE WITNESS: Depending on their needs, your Honor, to help them — if it's a child like Michael, with a specific learning disability, I guess to help him to learn. If it's a child who is blind, [3-83] help him to function, et cetera. It could even go so far as to, I assume, build ramps for a handicapped child if he uses a wheelchair.

Now, that's, you know, how I look at the law, yes.

Q But you don't understand, sir, it is not your understanding your personal understanding, that the purpose of this law is to return a child as rapidly as possible into a real-life setting, where he can partake of activities, as best he's able, with nonhandicapped children?

A I don't see how it could, when the — how can you return somebody. Before they had law, they had no place to put them. They didn't have any place for them. How could they be returning them? The purpose of the law, I assume, is to educate them or to help them. Then, if possible, get them back into a situation where they were with normal people or within a class with least restrictive, yes.

Q But that's your understanding?

A Absolutely.

MR. BERMAN: Thank you. I have no further questions.

THE COURT: Anything else, Mr. Rosenberg?

MR. ROSENBERG: Just one question, your Honor.

[3-84] Redirect Examination by Mr. Rosenberg

Q Do you remember, Mr. Panico, during Mr. Berman's cross-examination, his asking you whether you had with you today certain notes from your — that you'd taken at the May 25th meeting.

A Yes, I do.

Q And was your answer to that, you did not have them?

A I did not have the notes.

Q I'm going to show you a document, which was Parents' Exhibit 25 in the Administrative Hearing, Mr. Panico.

Would you take a look at those, that exhibit, please?

A Yes, sir.

Q Is that a copy of the notes that you took at the May 25th meeting?

A Yes, it is.

MR. ROSENBERG: Thank you.

[3-85] Recross-Examination by Mr. Berman

Q Mr. Panico, did you take these notes at the hearing or later?

A Right where I was sitting?

Q As you were —

A Right where we were sitting at. Except on the left-hand side of the page, there's two lines, I think, up there written, those were done when I went home.

MR. ROSENBERG: Except it was not at the Hearing, it was at a meeting.

THE WITNESS: May 25th meeting.

MR. BERMAN: No further questions.

THE COURT: Thank you, Mr. Panico, you're excused.

[Transcript of a portion of the trial held on May 18, 1982 before Judge Zobel in the United States District Court, Boston, Massachusetts. The transcript includes testimony of Dr. Marcel Kinsbourne, an expert witness recalled in rebuttal by the plaintiffs, found at Transcript Volume IV, pages 4-135 to 4-150, and reproduced in the Record Appendix, Volume II, pages 4-135 to 4-150.]

[4-135] MARCEL KINSBOURNE, Recalled

Direct Examination by Mr. Berman

Q Dr. Kinsbourne, please identify yourself for the record.

A I'm Marcel Kinsbourne.

Q And you understand, sir, that you're still under oath?

A I do.

Q And you've been present, have you not, during this entire case?

A Yes.

Q And did you hear the testimony yesterday of Dr. Melvin Levine?

A I heard it.

Q And did Dr. Levine's testimony in any way change your opinion that Michael Panico is suffering from an attention deficit disorder?

A No.

MS. JANOS: Objection, your Honor. I don't think that this is appropriate rebuttal testimony.

THE COURT: Well, insofar as he's talking about what's appropriate for the following years, I'll allow it. To the extent that Dr. Levine said the same thing, I'm not sure why he would disagree, in any event.

Q Well, would you please explain to her Honor the basis [4-136] where the areas in which you disagree with Dr. Levine and the basis for your disagreement?

A Yes, Mr. Berman.

Whereas, as your Honor has remarked, Dr. Levine and I substantially agree on the attention deficit, which I not therefore further characterize. I regard the claim that Michael has been dependently of that, a visual-processing problem of the type Dr. Levine described as speculative for the following reasons: First of all, when a child has an attention deficit, that can be potentially affect any test a child is given. It makes interpretation of all tests difficult. In other words, although one always gets a result on a test, the result may not mean what it would otherwise mean if the child's attention towards the test procedure was inconstant.

In particular, this is the case — excuse me, perhaps if I have a drink of water.

[Pause.]

A [Continuing.] This is particularly the case, if the tests involves multiple-simultaneous features, a number of things a child looks at or is supposed to look through at the same time, and I will come back to that point.

So, in fact, the findings on the record [4-137] and the findings that Dr. Levine's own group produced, could well be sufficiently explained by the child's fluctuating and inconstant attention.

However, there are two other points to note.

One is that the conclusions drawn by Dr. Levine from the tests he gave were different from those drawn by previous experts, both inside and outside the School System.

THE COURT: I'm sorry, what were different?

THE WITNESS: The conclusions he drew from the tests he gave had no precedent, in conclusions drawn, by tests given by psychologists and others, either within the Burlington School System or outside it. Say, at Mass. General.

A [Continuing.] Dr. Levine picked out two procedures as forming the basis for his opinion.

The first was the child's strategy in copying geometric shapes, not the child's ultimate performance, which as your Honor recalls, was good or described as perfect, I believe, but how the child went about it.

Now, the issue of the strategy of how one goes about copying geometric shapes and what it tells one about brain function is one on which I wrote a fundamental paper in 1968, and which I acknowledge.

[4-138] The knowledge that I have tells me that the performance that Dr. Levine described, could arise from a number of different causes. Specifically, it could arise from anxiety. The reason is that when a person is anxious, they tend to focus their attention on just a very small component of what's there. And when the test has multiple components, like a complex figure to be copied bit by bit, then that child who is anxious, or any person who is anxious, will lock their attention on one component and encounter the kind of difficulty described.

Now, Dr. Levine claimed that Michael was not anxious when he took the test, but his colleague, Dr. Szlyk, who examined Michael at the same time as a psychiatrist, said that he was. And it's hard to imagine Michael not being anxious under those circumstances.

Secondly, insofar as Michael did have a problem with this kind of performance, as I described in the paper to which I have referred, as many others have described and confirmed, that kind of difficulty relates to a part of the brain quite different from that in which language is involved. Namely, the right hemisphere or the left hemisphere of the brain.

What I'm addressing, here, is what we call the construct validity. Meaning, given that the child [4-139] performed in this way: What does this tell us about anything else than the fact that he did so? What does it tell us, specifically, about his difficulty in learning to read?

Now, it will generally be supposed that the kind of difficulty in copying shapes that was described, bears no relation whatever to facilitate reading. In other words, there is a disassociation, as we say, between a person's ability in these two matters, so that they can be good in one, but not necessarily good in the other.

THE COURT: Even though, as I understood Dr. Levine to say, the inability to see the whole is a fact. Assume for the moment that it is a fact. That does not affect a person's ability to see the word as a whole?

THE WITNESS: No. In fact, there are many patients who have, as I've mentioned, right hemisphere damage which is so severe, that they could not find their way at all around this courtroom, and their reading is unimpaired. Such, is a localization of different types of functions in the brain. And this has been documented many times by myself and many others.

A [Continuing.] However, the other tests that Dr. Levine [4-140] quoted, does go to the heart of the matter because it does deal with reading. Namely, the Monroe-Sherman Test, or word discrimination, which is mentioned on Page 11 of his report.

And as your Honor will recall, Dr. Levine explained that in this test, the child is asked to read words in context which make the meaning either meaningful or nonsense. And the position that Dr. Levine took in interpreting his findings was that Michael had great trouble with word envelopes, with the configurization of words as a root, to understanding the word as written. As printed.

Now, what I would wish to point out, your Honor, is that this is a test of reading achievement. If one wishes to draw inferences about the nature of the difficulty over and above the severity of the difficulty, one has to show that on such a test the child does much less well than on other relevant tests.

If one wished to interpret the Sherman-Monrose performance as characterizing Michael's most vulnerable point, then one has to show that on other tests of other aspects of reading, Michael does much better, relatively speaking, even though he may not do well.

THE COURT: Wait a minute. Try that again.

[4-141] THE WITNESS: Yes.

A [Continuing.] Reading is a complex process with many components. Different tests of reading put strain on different components of that process. That's oral reading, that's reading comprehension, that's word recognition, and so on and so forth.

Now, if you wish to take one of the tests, in this case, the Sherman-Monroe, and say: Because he had trouble here, that shows that his real basic problem is X. Then you have to show that he had more trouble here than in these other tests. Otherwise, he merely was bad at everything with reading, and no specific inference can be drawn.

Now, when one looks at the report that Dr. Levine's group produced, in fact, he scored at the grade level of 3.7 on the Monroe-Sherman Tests, which was, for him, relatively speaking, not at all bad. And, in fact, he scored better on that test than he did on other tests described on the previous page, when he was at early second grade level.

So I do not believe one can single out an imperfect performance on that test as indicative of a particular kind of, say, dyslexia, when the case has not been made that there was a selective difficulty there.

[4-142] The final point I want to make in answer to Mr. Berman's question is that I agreed with Dr. Levine point that anxiety would compound and aggravate weak attention.

And I am of the opinion that this child has an attention deficit; that it is definite; that anxiety would make it worse; and that whether there are underlying other difficulties, as well, is really preponderable for the reasons that I have stated.

Q With respect to the school year 1979-1980, have you an opinion, Dr. Kinsbourne, as to whether the Carroll School was an appropriate placement for Michael Panico?

A I do.

MR. ROSENBERG: Objection, your Honor. I don't even believe he visited the Carroll School in 1979-1980.

THE COURT: I thought he said he went there at some point.

MR. BERMAN: No, your Honor, he did not. And I don't —

THE COURT: He can do it on the basis of testimony he heard.

I'll allow it.

Q Would you please state what your opinion is?

A I have an opinion, and my opinion is that it was not [4-143] an adequate placement.

THE COURT: Not an adequate placement?

MR. BERMAN: Appropriate.

THE WITNESS: Appropriate. I'm sorry.

Q Would you please state the basis for your opinion, Dr. Kinsbourne?

A Yes. I have three reasons for this opinion.

The first is Michael's unsatisfactory progress while there. Second is based on the method of instruction used. And the third is based on the restrictive nature of that setting, which I think is unnecessary for this particular child.

With respect to the progress actually made, if I may refer to the document presented as a listing of test results by the Carroll School over several years. Trying to get a picture from such a chart of this child's progress is, in fact, quite difficult, because there are wild fluctuations of performance; as, indeed, is typical of a hyperactive or attention-deficient child. And some of the contradictions that one hears and that I heard in listening these few days between appraisals of how well the

child did in one or another setting, how one often hears when attention is fluctuating. And these are performance differences. Basic knowledge is not necessarily always tapped by the test. [4-144] However, we still do have here, at least, some objective figures to give us a guideline.

Looking at these figures and discounting, which I feel we should, for the reasons that I'm prepared to give, the figures under the heading of "September '79," one then looks, first at the Gray Oral Reading, which was at 2.8, that's the eighth month into the second grade, on 5/80; and at 4.2 at 9/81.

This gives one, a gain of a year and four months, which is commensurate with the passage of time, but certainly not remedial in that the gap is not being closed between this child's achievement level and that expected of a normal child of comparable age.

He fares less well on other tests.

With respect to the Stanford Achievement Test, we see that from 5/80 till 9/81, he has gained one year and five months. And we see that in the Gates-MacGinitie he has gained from 2/80 till 1/82, that is one month short of two years, from 2.5 to 3.3.

He does better on the vocabulary part of the Stanford Achievement Test, going from 3.8 to a 6.8 in a year and four months.

But then, again, when one comes down to the [4-145] spelling test at the bottom, the Stanford Dictated Test, one sees, again, rather minimal progress.

I would further point out that as early as March 1978, three of these tests were administered, not by the Burlington School System but by the Mass. General Hospital. And in two of them, he was then recorded as being within the second grade level, and one of them the third grade level.

So it cannot really be argued that there has been a breakthrough in the period of time in which he has been at the Carroll School.

The second point that I would like to make, your Honor, has to do with the Carroll School program, specifically this child, meaning no criticism of the school in any other way.

The dedication of the Public School to a particular approach, the Orton-Gillingham, is excellent where it works.

In this case, however, it patently has not. It was used for a year and a half by Mrs. Black in the Burlington System, and it has now been used for another two and a half years or more. And after four years, we have just reviewed where we are.

Now, it seems to me that a child of Michael's type needs a flexible and eclectic approach, which will [4-146] react to failure to make progress by shifting ground to some other methodology or added methodology.

And it is not clear to me that Michael's teachers had the experience and the breadth of knowledge of teaching methods to be able to do this with the best way in the world.

The third point I would like to make, and the final one, is that much has been made and much often is made of the desirability of having a child, who is failing substantially, be with a peer group of comparable failure. And up to a point, there is a core of usefulness in that the child should certainly know he is not the only one in this predicament.

However, that is not to say that one should pretend to the child that nothing is happening and nothing is wrong, and to move him into an artificial environment where his failure is the norm.

What is more important is that the child should learn, as we must all, that whatever we do, there will be somebody who does it better, and there will be many things we do badly.

What he needs is not to pretend that isn't the case, but support in grasping the fact and enduring the fact and accommodating to the fact that it is the case.

[4-147] And if the child is able to be given an adequate program of instruction, then it is superior to give that program in the context of a reality within which he will, in any case, have to live for the rest of his life.

So that, in my opinion, if a child is able to receive adequate instruction in a setting where mainstreaming is possible, in a public setting, then there is only one other reason for, nevertheless, sending the child to a residential or specialized institution. That reason would be unsatisfactory nature of the child's total environment, home and school.

If the home, as well as the school, is a disaster area, if everything is terrible, then removing the child out of the setting altogether is justified for a clean break.

Now, it is the case, in my opinion, that Mr. Panico's ingrossed attention in Michael's reading, as he has described in his testimony, is potentially detrimental to Michael.

However, I've heard nothing, in general, on the record, which would contradict the view that Michael enjoyed an excellent family situation. And I have no reason to suppose that that reason would [4-148] apply in this particular case.

So my final point in summary is that given adequate and appropriate instruction, the possible, in a public-school setting, it would, for the reasons given, be better to have it there than to have instruction even of comparable excellence in an institution.

THE COURT: Do you have other questions?

MR. BERMAN: I have one other question.

Well, I'll do without the question. No further questions.

THE COURT: Well, do you have any cross-examination?

MR. ROSENBERG: I have one question.

Me or Mr. Berman?

THE COURT: Mr. Berman has given up his question so that you might have yours.

MR. ROSENBERG: That's very kind of him. I appreciate it.

[4-149] Cross-Examination by Mr. Rosenberg

Q Do I understand you to say, Dr. Kinsbourne, that you agree with Dr. Levine's assessment of Michael's attention or behavioral problems?

A In my opinion, Dr. Levine and I are using different language to say the same thing; that Michael is, indeed, hyperactive or suffering from attention-deficit disorder.

Q So the answer to my question is yes?

A Yes.

MR. ROSENBERG: Thank you.

THE COURT: Dr. Kinsbourne, if Michael were in — that is, if one were to find that Dr. Levine's diagnosis is correct and that Michael has a visual perception difficulty, would the McAleer classroom, as it was outlined in evidence, be an appropriate place to deal with that difficulty?

THE WITNESS: It would, because it addresses that difficulty. In other words, the emphasis on sight vocabulary that we have heard about, the emphasis on fluency. The Learning Master I referred to in my previous testimony. These are devices pertinent on increasing fluency in identifying visual patterns, rather than going through a painful phonic, step-by-step approach, which was useful and which he has mastered, [4-150] but where he is now stuck.

THE COURT: Anything else?

MR. BERMAN: I have no further witnesses, your Honor.

THE COURT: Thank you, Dr. Kinsbourne, you're excused.

[The following was filed in the District Court on October 29, 1982, as an attachment to the State Defendant's Memorandum in Support of its Opposition to Plaintiffs' proposed form of judgment.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TOWN OF BURLINGTON and the
SCHOOL COMMITTEE FOR THE
TOWN OF BURLINGTON,
Plaintiffs

v. CIVIL ACTION

THE DEPARTMENT OF EDUCATION OF NO. 80-359-Z
THE COMMONWEALTH OF MASSACHUSETTS
and JOHN DOE, as he is father and
next friend of JOHN DOE, JR.,
Defendants

AFFIDAVIT OF THOMAS COLLINS

---

1. My name is Thomas Collins. I am employed by the Department of Education, serving as the Director of the Bureau of Data Collection and Reporting.

2. Pursuant to the provisions of General Laws Chapter 72, Sections 3-5, and Chapter 70, Section 4, all school districts are required annually to submit pupil and financial data to the Department of Education. This information is reported in a document titled, "End of Year School Returns: Pupil and Financial Report" (End of Year Report), which is certified as to accuracy under pains and penalty of perjury by the school superintendent and city or town auditor. The Bureau of Data Collection and Reporting receives the End of Year Reports and under my direction processes the information contained therein.

3. Utilizing data collected from the End of Year Reports the Department of Education, through the Bureau of Data Collection, annually prepares a summary of average per pupil expenditures for each school district. The calculations show each district's

average costs for regular, bilingual, special, and occupational day educational programs and for the four programs as a whole. In the case of special needs expenditures, the average per pupil expenditures are calculated by prototype: modified regular education programs, programs with less than 25% of the time outside the regular classroom, programs with 25% to 60% outside the regular classroom, substantially separate public school-based programs, private day school placements, private residential school placements, home or hospital-based programs, and preschool programs.

4. In calculating the average per pupil expenditures for special education programs the Bureau bases its calculation on information the End of Year Report provides, which includes: 1) instructional expenditures for each prototype; 2) transportation expenditures for each prototype; 3) a count of children in each prototype; 4) allocated overhead costs attributable to the prototype; and 5) tuition expenditures in each prototype.

5. This information has been published by the Department for the school years, 1979-80 and 1980-81, in publications titled, "Per Pupil Expenditure, 1979-1980," and "Per Pupil Expenditure, 1980-1981." The comparable publication for the 1981-82 school year has not yet been issued. A copy of each publication is attached hereto as Appendix A and Appendix B.

6. In the school year 1979-1980, Burlington's average per pupil expenditure for substantially separate (502.4 prototype) special education programs was $4015. In the school year 1980-1981, Burlington's average per pupil expenditure for the same special education prototype was $7801.

7. For the school year 1981-1982. I have calculated Burlington's average per pupil expenditure for substantially separate special education programs, utilizing the Bureau's standard procedures described above and relying upon the financial and pupil data reported by Burlington in its End of Year Report for the 1981-1982 school year, which was received by the Bureau of Data Collection and Reporting on September 13, 1982. The amount for the 1981-1982 school year was $6783.

Signed under pains and penalties of perjury this twenty-seventh day of October 1982.

/s/ Thomas Collins

Date: October 27, 1982

_____

Notary Public

My commission expires: January 19, 1986.

[The following was filed in the District Court on January 17, 1983.]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

TOWN OF BURLINGTON and the SCHOOL COMMITTEE FOR THE TOWN OF BURLINGTON,
Plaintiffs,

VS.

THE DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS and JOHN DOE as he is father and next friend of JOHN DOE, JR.,
Defendants.

CIVIL ACTION NO. 80-359-Z

STIPULATION OF FACTS ON PLAINTIFFS' REQUEST FOR REIMBURSEMENT

With respect to plaintiffs' request that the judgment to be entered in the above-entitled action include sums expended by plaintiffs for private school tuition of Michael Panico after September 1, 1979, the parties hereby stipulate that the statements of fact herein made are true and may so far as they are material be considered by the Court; but the parties do not hereby stipulate that any such statement is material or waive their right to offer other evidence.

1. Exclusive of reimbursement received from the Commonwealth of Massachusetts for the education of special needs Children, the average cost of educating a special needs child in the Burlington public schools was $6,050.00 in the 1979-1980 school year, $6,361.00 in the 1980-1981 school year and $7,069.00 in the 1981-1982 school year.

2. In the 1980-1981 school year plaintiffs paid to the Carroll School $5,685.00 in tuition for the education of Michael Panico.

3. In the 1981-1982 school year plaintiffs paid to the Carroll School $5,850.00 in tuition for the education of Michael Panico.

4. In the course of the 1980-1981 and 1981-1982 school years plaintiffs paid Michael Panico's parents $1,129.68 to reimburse them for transporting him to and from the Carroll School.

5. The average cost to plaintiffs of school transportation for children with special needs in the period from September, 1979 to June, 1982 was $2,264.00 per year.

6. The average State contribution to Burlington for a full time equivalent special education student excluding transportation costs was $1,384.00 for the school year 1979-1980, $1,465.00 for the school year 1980-1981, and $1,579.00 for the school year 1981-1982.

/s/ _____
David Berman
COUNSEL FOR PLAINTIFF

/s/ _____
Ellen Janos
COUNSEL FOR DEFENDANT
STATE DEPARTMENT OF EDUCATION

/s/ _____
David Rosenberg
COUNSEL FOR DEFENDANT PANICOS

DATE:

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 80-359-Z

TOWN OF BURLINGTON and the SCHOOL COMMITTEE FOR THE TOWN OF BURLINGTON

vs.

THE DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS and JOHN DOE, ppa, JOHN DOE, JR.

JUDGMENT

ZOBEL, D.J.

In accordance with the Memorandum of Decision dated August 13, 1982, and the Opinion dated March 7, 1983, it is

Ordered and Adjudged

1. That the appropriate educational placement for Michael Panico for the school year 1979-1980 was at the Pine Glen School as provided in the Individualized Educational Plan drawn up by plaintiffs in June 1979 and the plaintiffs are not responsible for any costs incurred in educating Michael Panico at the Carrol School for the school year 1979-1980.

2. That defendant Robert A. Panico having failed to prove that Michael Panico's placement at the Pine Glen School would have been inappropriate, plaintiffs are not liable for the costs incurred in educating Michael Panico at the Carroll School for the school years 1980-1982.

3. That defendant Robert A. Panico pay to plaintiffs the sum of $8,449.00, which represents the amount of tuition paid by plaintiffs on behalf of Michael for the school years 1980-1981 ($5,685.00); and 1981-82 ($5,850), less the sum of reimbursements received by plaintiff from the state in each of said years ($1,465.00 and $1,579.00, respectively), and the payment to Dr. Levine ($42.00).

4. That the Clerk of this Court repay to plaintiffs the sum of seven thousand seven hundred thirty-nine and 88/100 ($7,739.88) dollars deposited with him by plaintiffs, together with any and all interest earned on said deposit.

5. That the counterclaims be dismissed with prejudice.

6. That plaintiffs recover their costs.

May 9, 1983
DATE

/s/_____
Rya W. Zobel
DISTRICT JUDGE

SUPREME COURT of the UNITED STATES

No. 84-433

School Committee of the Town of Burlington,

Massachusetts, et al.,

Petitioners

v.

Department of Education of the Commonwealth

of Massachusetts, et al.

ORDER ALLOWING CERTIORARI.

Filed December 3, 1984.

The petition herein for a writ of certiorari to the United States Court of appeals for the First Circuit is granted, limited to Questions I and V presented by the petition.

A true copy ALEXANDER L. STEVAS
Test:
Clerk of the Supreme Court of the United States
By /s/

C.W. Vasil
Deputy

Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS
CLERK

(7)

No. 84-433.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,
v.
DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO A/K/A JOHN DOE, SR., AS HE IS NEXT FRIEND OF MICHAEL PANICO A/K/A JOHN DOE, JR.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Petitioners.

CORRECTED COPY

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75 MP

Questions Presented.

I. May a United States District Court award damages to the parents of a handicapped child on the grounds that a local educational agency has neglected to prepare an adequate IEP or has in the past committed procedural and substantive violations of EHA law, or cognate state law, or on the ground that it would be equitable to award such damages?

II. If the answer to the foregoing question is affirmative, was this an appropriate case for the award of such damages?

III. Do the provisions of 20 U.S.C. § 1415(e)(3), generally or on the facts of this case, bar relief to parents who reject an IEP and without agreement by local or state authorities place a child in a private school while administrative proceedings are pending?

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No. 84-433.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,
v.
DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO A/K/A JOHN DOE, SR., AS HE IS NEXT FRIEND OF MICHAEL PANICO A/K/A JOHN DOE, JR.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Petitioners.

Citations to Opinions Below.

The following opinions are reprinted in the record-appendix of the Petition for Writ of Certiorari. They are unreported unless otherwise noted.

1. Decision of the Bureau of Special Education Appeals of the Department of Education of the Commonwealth of Massachusetts dated January 31, 1980.

2. Opinion of the United States District Court for the District of Massachusetts, Zobel, J., dated November 19, 1980.

3. Opinion of the United States Court of Appeals for the First Circuit dated June 18, 1981 and reported at 655 F.2d 428 (1st Cir. 1981).

4. Pre-trial Order of the United States District Court for the District of Massachusetts, Zobel, J., dated March 18, 1982.

5. Memorandum of Decision of the United States District Court for the District of Massachusetts, Zobel, J., dated August 13, 1982.

6. Opinion of the United States District Court for the District of Massachusetts, Aldrich, J., dated March 7, 1983 and reported at 561 F.Supp. 121 (D. Mass. 1983).

7. Opinion of the United States Court of Appeals for the First Circuit dated May 29, 1984 and reported at 736 F.2d 773 (1st Cir. 1984).

8. Judgment of the United States Court of Appeals for the First Circuit, entered May 29, 1984.

9. Order of the United States Court of Appeals for the First Circuit denying a motion for rehearing dated June 29, 1984.

The following opinions are reprinted in the Joint Appendix.

1. Memorandum and Order of the Court of Appeals for the First Circuit, entered January 28, 1981.

2. Order of the United States District Court for the District of Massachusetts, Zobel, J., dated February 12, 1981.

3. Judgment of the United States District Court for the District of Massachusetts, Zobel, J., dated May 9, 1983.

4. Order of the United States Supreme Court granting certiorari, December 3, 1984.

Jurisdiction.

On May 29, 1984 the United States Court of Appeals for the First Circuit entered judgment affirming in part and

reversing in part a judgment of the United States District Court for the District of Massachusetts. Plaintiffs were given until June 18, 1984 to file a petition for rehearing and filed a petition for rehearing on that date. On June 29, 1984 the petition for rehearing was denied. On September 18, 1984 a petition for writ of certiorari was filed and, on December 3, 1984, was granted, limited to questions I and V. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutory Citations.

CONSTITUTION OF THE UNITED STATES.

AMENDMENT XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

UNITED STATES STATUTES.

UNITED STATES CODE, TITLE 5.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Education of the Handicapped Act".

(b) Findings

The Congress finds that—

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children,

but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2) (B) of this title a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

§ 1417. Administration

(a) Duties of Secretary

(1) In carrying out his duties under this subchapter, the Secretary shall—

(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this subchapter;

(B) provide such short-term training programs and institutes as are necessary;

(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

(D) assure that each State shall, within one year after November 29, 1975, provide certification of the actual number of handicapped children receiving special education and related services in such State.

(2) As soon as practicable after November 29, 1975, the Secretary shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this subchapter in order to assure equity among the States.

(b) Rules and regulations

In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

(c) Protection of rights and privacy of parents and students

The Secretary shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State and local educational agencies pursuant to the provisions of this subchapter.

(d) Hiring of qualified personnel

The Secretary is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 1418 of this title and to carry out his duties under subsection (a)(1) of this section without regard to the provisions of Title 5 relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time.

§ 1418. Evaluation

(a) Duties of Secretary

The Secretary shall directly or by grant, contract, or cooperative agreement, collect data and conduct studies, investigations, and evaluations—

(1) to assess progress in the implementation of this chapter, the impact, and the effectiveness of State and local efforts to provide free appropriate public education to all handicapped children and youth; and

(2) to provide Congress with information relevant to policymaking and provide Federal, State, and local educational agencies with information relevant to program management, administration, and effectiveness with respect to such education.

(b) Collection of data on education of handicapped children and youth; additional information

In carrying out the responsibilities under this section, the Secretary, on at least an annual basis, shall obtain data concerning programs and projects assisted under this chapter, and under other Federal laws relating to the education of handicapped children and youth, and such additional information, from State and local educational agencies and other appropriate sources, as is necessary for the implementation of this chapter including—

(1) the number of handicapped children and youth in each State receiving a free appropriate public education (special education and related services) by disability category and by age group (3-5, 6-11, 12-17, and 18-21);

(2) the number of handicapped children and youth in each State who are participating in regular educational programs, by disability category (consistent with the requirements of section 1412(5)(B) of this title and section 1414(a)(1)(C)(iv) of this title), and the number of handicapped children and youth in separate classes, separate schools or facilities, or public or private residential facilities, or who have been otherwise removed from the regular education environment;

(3) the number of handicapped children and youth exiting the educational system each year through program completion or otherwise, by disability category and age, and anticipated services for the next year;

(4) the amount of Federal, State, and local funds expended in each State specifically for special education and related services (which may be based upon a sampling of data from State agencies including State and local educational agencies);

(5) the number and type of personnel that are employed in the provision of special education and related services to handicapped children and youth by disability category served, and the estimated number and type of additional personnel by disability category needed to adequately carry out the policy established by this chapter; and

(6) a description of the special education and related services needed to fully implement the chapter throughout each State, including estimates of the number of handicapped children and youth within each disability by age group (3-5, 6-11, 12-17, and 18-21) in need of improved services and the type of programs and services in need of improvement.

. . . . . .

(e) Specifically mandated studies

(1) At least one study shall be a longitudinal study of a sample of handicapped students, encompassing the full range of handicapping conditions, examining their educational progress while in special education and their occupational, educational, and independent living status after graduating from secondary school or otherwise leaving special education.

(2) At least one study shall focus on obtaining and compiling current information available through State educational agencies and local educational agencies and other service providers, regarding State and local expenditures for educational services for handicapped students (including special education and related services), and gather information needed in order to calculate a range of per pupil expenditures by handicapping condition.

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§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

. . . . . .

FEDERAL REGULATIONS.

34 Code of Federal Regulations.

§ 300.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

. . . . . .

The following are found in the statutory appendix to the petition for certiorari:

Constitution of the United States, Art. VI, Supremacy Clause.

United States Statutes: 20 U.S.C. § 1401, 20 U.S.C. § 1411, 20 U.S.C. § 1412, 20 U.S.C. § 1414, 20 U.S.C. § 1415, 20 U.S.C. § 1416.

Federal Regulations: 34 C.F.R. §§ 300.121a, 300.126, 300.128-130, 300.300, 300.304, 300.343, 300.347, 300.403, 300.452, 300.501, 300.503, 300.504, 300.530-534, 300.540-543, 300.550-554.

Federal Rules of Appellate Procedure: Rule 3(c).

State Statutes: Mass. G.L. c. 71B, § 10.

State Regulations: 603 C.M.R. 311, 327.1, 327.2, 330-333, 335, 403, 409.

Statement of the Case.

Michael Panico has a learning disability (Pet. A. 15a).* Litigation between his parents, the Panicos, and petitioners, the Town of Burlington (Massachusetts) and its school committee, began in the summer of 1979 when Mr. Panico rejected (J.A. 18, Pet. A 59a-60a) an individual education plan (IEP) drawn up by local school authorities (J.A.7 to 23), placed Michael in the Carroll School (a private school for children with learning disabilities) (Pet. A. 3a), and asked the Bureau of Special Education of the Department of Education of the Commonwealth of Massachusetts (the Department) to validate the rejection and the private school placement (J.A. 28).

The Department designated a hearing officer who held hearings in September, October and November of 1979 (R.A. Vols. III and IV). On January 31, 1980, she rendered a decision that approved the placement of Michael in the Carroll School (Pet. A. 13a-14a, 23a-24a). Petitioners brought an action in the United States District Court for the District of Massachusetts to have the decision set aside (J.A. 175). After several skirmishes on preliminary issues of procedure and sub-

* The following abbreviations to various appendices are used. Appendix to the Petition for Writ of Certiorari: Pet. A.; Record Appendix (in four bound volumes as submitted to the First Circuit Court of Appeals): R.A.; Joint Appendix to this Brief: J.A.

stance,[1] three of which were ruled on by the Court of Appeals for the First Circuit, see *Town of Burlington* v. *Department of Education (I)*, 655 F.2d 428 (1st Cir. 1981) (Pet. A. 36a), the District Court tried the case for four days in May of 1982 (R.A. Vol. II). In May of 1983, a judgment generally favorable to petitioners was entered[2] (J.A. 406). Respondents appealed. The First Circuit heard oral argument on November 8, 1983, and on May 29, 1984 a panel rendered an opinion, *Town of Burlington* v. *Department of Education (II)*, 736 F.2d 773 (1st Cir. 1984) (Pet. A. 87a), and judgment (Pet. A. 144a) generally unfavorable to petitioners.[3] Rehearing was sought and denied (Pet. A. 146a). This Court has granted certiorari (J.A. 408).

Michael entered kindergarten at petitioners' Memorial School in September of 1975 (Pet. A. 2a). At the end of the 1976-1977 school year his teacher thought that he was immature and recommended that he be considered for retention (J.A. 38, 57; R.A. IV, p. 326). His parents, however, apparently aware of the rights of handicapped children, insisted that he be given a core evaluation (J.A. 38-39; R.A. IV, p. 4) to determine whether he had a learning disability and, if so, the appropriate program of remediation. Although the parents were not informed that such an evaluation could include an independent medical assessment (J.A. 59), the evaluation, including the assessment (J.A. 380), was carried out (R.A. IV pp. 1-47).

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[1] Petitioners will focus on these preliminary skirmishes later in this statement to the extent necessary to illuminate the issue of reimbursement, in this case a euphemism for damages.

[2] The judgment declared that petitioners' IEP was adequate and appropriate and ordered respondent Panico to reimburse petitioners for sums expended for Michael's education at the Carroll School, see p. 20, *infra*, but set off sums received by petitioners from the Commonwealth of Massachusetts toward Michael's education (J.A. 407). On the limited basis of that set off, petitioners cross-appealed.

[3] The First Circuit ruled that the District Court had erred in not giving the hearing officer's decision due weight (Pet. A. 106a, 113a-120a) and not resolving supposedly conflicting diagnoses of Michael's underlying dyslexia (Pet. A. 119a-120a) and may have erred in receiving evidence (Pet. A. 113a-116a). It also found error in the allocation of the burden of proving proper placement for years subsequent to 1979-1980 (Pet. A. 121a-122a, 124a).

At its conclusion the parents asked that the decision on retention be deferred until fall, since Michael was to be privately tutored over the summer (J.A. 40, 61). An IEP was not drawn up because the assessments did not indicate any special needs (J.A. 198, 223-224; R.A. III, pp. 400-402).

In September of 1977 Michael entered the second grade at Memorial School. His progress, at least according to his parents, was unsatisfactory (J.A. 40, 63-64). In March of 1978 petitioners drew up an IEP (R.A. IV, pp. 337-341), approved by his parents, under which Michael remained at the Memorial School but spent some time each day in a reading clinic. The IEP was to remain in effect for one year.

On May 24, 1979, Michael, after missing recess and lunch because of routine testing that had been carried out by special education personnel at the Memorial School (R.A. IV, p. 129), exhibited symptoms of serious emotional disturbance at home (J.A. 89-90, 354-355; R.A. III, pp. 539-540). On May 25, 1979 Mr. Panico met with the Town Coordinator of Special Education and demanded an immediate new core evaluation (J.A. 323), notice for which was drawn up at once (R.A. IV p. 138). A team was convened and found that Michael suffered from serious reading disabilities (J.A. 202-203, 206; R.A. IV, pp. 138-140). After that meeting on June 4, 1979, in which the parents participated, an IEP was drawn up for the 1979-1980 school year placing Michael in a special education classroom of the Pine Glen School, another public school of the Town (J.A. 7-23). He was to be taught by an experienced teacher, John McAleer (Pet. A. 63a; J.A. 225, 243-244, 254, 287). The IEP provided that Michael would be able to take lunch, recess, music, art and gym with non-handicapped children (Pet. A. 62a) and it was contemplated that he, as soon as possible, take mathematics with them as well (Pet. A. 16a; J.A. 210, 238). The focus of the plan was on reading and related skills (J.A. 7-14, 203, 206, 231-239, 270; Pet. A. 7a, 62a).

The parents rejected the IEP and without seeking or obtaining permission from local or state educational authorities enrolled Michael in the Carroll School, a private school in Lincoln,

Massachusetts, exclusively for children with learning disabilities (R.A. II p. 3-141).[4]

Petitioners' action in the District Court was commenced on February 26, 1980 (J.A. 175). The Complaint contained an application for a stay of the hearing officer's decision (J.A. 176). That application was denied on July 24, 1982, and petitioners appealed, treating the denial of the stay as the denial of a preliminary injunction. Michael remained in the Carroll School for the 1980-1981 (and 1981-1982) school year (J.A. 346). While petitioners' appeal was pending, in December of 1980, the Panicos suggested that they could no longer afford the tuition and related expenses for Michael at the Carroll School (Pet. A. 45a; D. Ct. Docket entry No. 128). Apparently under pressure from the Panicos, the Department of Education ordered petitioners to pay for Michael's education at the Carroll School. It threatened an immediate cut-off of federal funds, if petitioners did not comply (Pet. A. 40a, 71a, 84a-85a). Petitioners' response was to seek an order enjoining the Department from cutting off federal funds (D. Ct. Docket entries No. 131, 132 and 151). The Department of Education for its part had sought an injunction to enforce its decision requiring

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[4] Fully aware that petitioners were relying on 20 U.S.C. § 1415(e)(3) as a bar to any and all of their rights; respondents Panicos never at any time suggested to the District Court or the United States Court of Appeals that they had received actual permission from local or state authorities to withdraw Michael from the placement at Pine Glen and to place him in the Carroll School. The entire case was argued to both the District Court and the Court of Appeals, without objection on their part, on the theory that no such permission had been obtained. At the administrative hearing Mr. Panico submitted in written form, as well as orally, a chronology of Michael's progress through the Burlington school system. For the written chronology see J.A. 38-49; for the oral testimony see J.A. 50-174. He further testified at trial (J.A. 313-335, 336-390). At no time did he mention seeking permission from anyone to place Michael in the Carroll School. This is of particular import, since the written chronology deals in some detail with the events of the summer of 1979 between the time that the parents rejected the IEP on July 3, 1979 and the commencement of hearings on September 26, 1979 (J.A. 47-49). Mr. Panico also testified before the hearing officer to a conversation with the Burlington Superintendent of Schools on or about August 1, 1979, wherein Mr. Panico was told that if he wanted to pay the Carroll School, pay it; that was his choice (J.A. 163). In the circumstances, it is almost inconceivable that if Mr. Panico had asked permission from state or local authorities to enroll Michael in the Carroll School he would not have mentioned it explicitly.

petitioners to reimburse the Panicos for the tuition and related expenses from September of 1979 to January of 1981 (D. Ct. Docket entries No. 119, 121). Under this pressure, petitioners agreed to fund Michael's education at the Carroll School unless the Court of Appeals decided the application for a stay in their favor (Pet. A. 85a). The District Court on February 12, 1981 further ordered reimbursement of expenses from 1979 onward, and that order was appealed as well. The June 18, 1981 decision of the Court of Appeals (Pet. A. 36a) consolidated both the denial of the stay and the order of immediate reimbursement as well as a third order not immediately relevant (Pet. A. 41a). In essence, the court found that a stay was not necessary because petitioners had not shown any probability of immediate harm (Pet. A. 43a). The court made it clear that if petitioners were successful, the Panicos would have to repay the sums that the petitioners were now advancing (Pet. A. 45a). The court, however, vacated the order for immediate reimbursement (Pet. A. 47a). Again, it did so on the specific basis that no showing of irreparable harm had been made; the parents had not shown any need for reimbursement (Pet. A. 46a-47a).

Following the decision of the Court of Appeals, the District Court ordered the parties to file pre-trial memoranda and entered a pre-trial order on March 18, 1982 (Pet. A. 48a). The order stated that the hearing officer's decision would be given prima facie weight (Pet. A. 54a) and that petitioners would have the burden of showing that the rejected IEP would have afforded Michael an appropriate free public education (Pet. A. 56a). The court further ruled that for years after 1979-1980, for which no IEP had been prepared, the burden was on the parents to show that the placement in the Carroll School was appropriate (Pet. A. 56a). The court denied (Pet. A. 49a) petitioners' motion for summary judgment (J.A. 189) which was based on the provisions of § 1415(e)(3) and on the refusal of the Panicos in July of 1980 to make Michael and his school records available for a ten-month evaluation.

Petitioners' objectives at trial were to show that the IEP which the hearing officer had found to be adequate was one that they were prepared to implement; that education at the

Pine Glen School would have been, in terms of EHA objectives, superior to education at the Carroll School because of the opportunities at Pine Glen for Michael to participate in activities with non-handicapped children; and that the procedural irregularities found by the hearing officer either did not exist or were entirely trivial and had no bearing upon petitioners' ability to implement the plan. With respect to the placement for years subsequent to 1979-1980, petitioners' objective was to show that the parents had rejected the IEP for erroneous reasons and that placement in the Carroll School in those years could not be justified (Petitioners' post-trial Bf., pp. 1-11, 13-22, 23-30, 39-42. D. Ct. Docket entry No. 275).

The District Court's decision, which, as we have already noted, was generally favorable to petitioners, was entered on August 13, 1982 (Pet. A. 57a). Essentially, the District Court found that petitioners' 1979-1980 IEP, rejected by the parents, offered Michael a free appropriate education (Pet. A. 62a-63a). At the Carroll School, where Michael at the time of trial had been enrolled for the past three years, he was being taught by the Orton-Gillingham method which emphasizes "strong phonetic training" (Pet. A. 61a). At the Pine Glen School he would have been taught with Helen Grush materials, "closely related to Orton-Gillingham, yet more flexible" (Pet. A. 61a). Petitioners' expert preferred this method of teaching Michael and the court concurred (Pet. A. 61a). As the court noted (Pet. A. 61a):

> Michael had been taught according to the Orton-Gillingham method during the 1978-1979 school year. He had mastered phonics, but was unable to become fluent. Moreover, his progress at the Carroll School, although good, did not significantly narrow the gap between his reading ability and the level of ability appropriate to his age.

The objectives and methods set forth in the 1979-1980 IEP were fully appropriate and "reasonably calculated to enable Michael to receive educational benefits" (Pet. A. 62a). Moreover, because of Mr. McAleer's experience and the small highly structured class in which Michael would have been

taught, petitioners were fully able to implement the IEP (Pet. A. 63a). The parents had not met their burden of proof with respect to the continued placement in the Carroll School after 1979-1980 (Pet. A. 66a).

The memorandum of decision of August 13, 1982 (Pet. A. 57a) did not result in an immediate judgment. Respondent parents moved for a new trial on September 9, 1982; their motion was denied on September 30, 1982. The parties disagreed over the amount that the Panicos should repay petitioners, who had been funding Michael's education at the Carroll School from February of 1981 through June of 1982. Petitioners argued that all sums paid should be repaid *in toto*. Respondents took the view that the Panicos should repay nothing or, at most, only the difference, if any, between the average cost of educating a handicapped child in petitioners' public schools and the cost of educating Michael in the Carroll School (Pet. A. 86a; see J.A. 404). On issues of reimbursement the case was consolidated with several EHA cases pending in the District Court and sent to Senior Circuit Judge Aldrich for determination (Pet. A. 69a). Judge Aldrich ruled that the Panicos were required to repay the amounts that they had received from petitioners, but could deduct from the repayments the amounts that petitioners had recovered from the Commonwealth toward Michael's education (Pet. A. 86a). Judgment entered on May 10, 1983, in accordance with the memoranda of Judges Zobel and Aldrich (J.A. 406). Petitioners have received no money from the Panicos pursuant to the District Court judgment: under its terms they are entitled to $8449.00.

Summary of Argument.

Among the issues faced by the First Circuit were whether respondent parents were entitled to keep sums that petitioners paid to them in connection with their son's private school education from January, 1981 to the end of the 1981-1982 school year and whether they were entitled to receive additional

sums to cover other periods (p. 20). Addressing the District Court's finding that petitioners' IEP was fully appropriate, the First Circuit found that finding possibly erroneous in light of the District Court's failure to choose between supposedly conflicting diagnoses; but the District Court was plainly right in finding that the supposed conflicts were insignificant and, more important, there was no evidence that the difference in diagnoses would have affected the child's placement (pp. 20-21).

The First Circuit also ruled that the District Court ought to have decided whether certain "violations" found by the hearing officer to have occurred between 1977 and 1979 were serious, and if they were, to award reimbursement, *i.e.*, damages based on them, but if they were not the parents would still be entitled, absolutely, to damages from the date of the hearing officer's decision to the end of the 1979-1980 school year and, conceivably, on the basis of "equitable" considerations, for other periods as well (pp. 21-22).

That Congress did not intend damages to be awarded under EHA is evidenced by its conferring concurrent jurisdiction over EHA claims on the Federal court, knowing that some of these claims would be directly against a State having Eleventh Amendment immunity (p. 23), its provision for financial sanctions against State and local school districts that do not comply with EHA law (pp. 23-24), and its enactment of § 1415(e)(3) requiring that placement not be changed while administrative and judicial proceedings relating to an IEP are pending (p. 24). Also, allowing damages under EHA tends to derogate from the central purpose of EHA, which is the preparation of an appropriate IEP (pp. 24-25). The courts of appeals have generally held that damages cannot be recovered under EHA law, and that conclusion is foreshadowed by this Court's statements in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981) (pp. 25-26).

None of the circumstances pointed out by the First Circuit take this case out of the general rule that damages are not to be awarded under EHA (pp. 26-36). The parents presented no evidence of having relied on the hearing officer's decision to keep Michael in the Carroll School from the date of the hearing

officer's decision, and such reliance is highly unlikely in the face of the evidence (pp. 26-27). The change in placement violated Federal law, upon which no one can rely on a right to violate (pp. 27-28). In any event, there can be no recognizable "reliance" upon a decision subject to appeal and promptly appealed (p. 28).

Upon the facts of this case damages resulting from the failure to draw an adequate IEP are inappropriate and highly unlikely (pp. 28-29). Damages on the so-called procedural violations should not be awarded because Michael suffered no injury therefrom (p. 29) and because the violations are facially trivial (pp. 29-32). The First Circuit's error in allowing such damages stems from improperly equating procedural violations with "bad faith" (p. 32). Even serious procedural violations may be no more than honest mistakes, and no point is served by punishing them (pp. 32-33).

EHA damages cannot, contrary to the First Circuit's opinion, be awarded on an "equitable" basis (pp. 33-35). The sole "equitable" basis for damages specifically noted by the First Circuit is, on analysis, no basis at all, and no other basis seems to exist (pp. 33-34). Even if it did, however, the notion of an "equitable" right to damages flies in the face of accepted equity jurisprudence (p. 34). Allowing the parents to keep moneys that they received from petitioners is the same as awarding them damages, and calling the repayment required by the District Court "reimbursement" to make it subject to "equitable" considerations is merely a labelling change (pp. 34-35).

The First Circuit also erred in holding that damages could be awarded for a school year as to which no IEP had been drawn since, otherwise, the whole administrative machinery of EHA is bypassed (pp. 35-36). Since the parents actively frustrated the drawing of an IEP for subsequent years, this is a particularly weak case for damages for those years (p. 36).

By implication borne out by the legislative history of EHA Congress has shown a nonabsolute preference for public school education of handicapped children, whereas parents, for reasons about which one can only speculate and which do not

appear to be related to superiority of education often prefer private education; this has created an often repeated conflict in EHA law (pp. 37-40 and 53 *et seq.*). Congress has, however, mandated in § 1415(e)(3) that a child's placement shall not be changed while proceedings under § 1415 are pending, and several courts have, contrary to the position taken by the First Circuit in this case, ruled that parents who unilaterally change the placement forfeit their right to EHA relief (p. 41).

For purposes of EHA law and this case, the placement that the parents ought not to have changed without permission was the June, 1979 placement in Pine Glen scheduled to commence in September, 1979 (pp. 41-43). In the context of EHA, that the parents prevailed at the State administrative level did not constitute permission to change the placement (pp. 43-45).

Thus, this case squarely raises the issue of how § 1415(e)(3) should be construed (p. 45). The First Circuit considered the language of (e)(3) directory rather than mandatory, relying in part on the legislative history of EHA, but its reliance on the legislative history was misplaced (pp. 45-46). Courts that have construed (e)(3) as mandatory have correctly concluded that the statutory language is clear and that any other construction is contrary to the purposes of EHA and may play havoc with the public fisc (p. 46).

Congress may have enacted (e)(3) for several cogent reasons (pp. 46-47). The reasons advanced by the First Circuit for reading qualifications and exceptions into (e)(3) do not stand up to close scrutiny (pp. 47-48). There is no reason to believe in the present case that enrollment in Pine Glen would have caused irreparable injury to the child (pp. 48-49), but if a child is suffering irreparable injury because of delay in the administrative process, the appropriate response is not to read such injury as creating an exception to (e)(3) but to invoke the jurisdiction of the courts (pp. 49-51). The second exception read into (e)(3) by the First Circuit, based on bad faith, is without basis in this case; bad faith is not proven by the existence of violations, serious or not, but exists where an IEP, valid on paper, is a sham (pp. 51-52). In such a case, however, the child will suffer irreparable injury, and immediate resort to the courts as well as the sanctions against State and school districts found in EHA are appropriate (p. 52).

Argument.

I. The Court Below Incorrectly Ruled that Damages Can be Awarded Under EHA.

Although it is less than clear from the First Circuit's May, 1984 opinion, as the Statement of the Case indicates, one serious issue facing both the District Court and the Court of Appeals was whether the parents would be reimbursed for tuition and related expenses incurred in educating Michael at the Carroll School between September of 1979 and January of 1981 and would be permitted to keep the sums advanced by petitioners under protest between February of 1981 and the end of the 1981-1982 school year. The District Court, having found that petitioners' 1979 IEP was appropriate and that respondents had not met their burden of showing that the Carroll School was an appropriate placement for subsequent years (Pet. A. 66a), ordered the Panicos to return all sums received by them (with the already noted exception of certain funds paid to petitioners by the Commonwealth) and awarded them no further damages (J.A. 406). On appeal to the First Circuit, respondents argued, *inter alia*, that even if the finding was correct, the Panicos should not have been required to repay petitioners (Brief for Parents, pp. 36-39; Brief for Dept. of Ed., pp. 26-28, 28-35).

The route by which the First Circuit approached the issue of damages was convoluted. It attempted to criticize the finding that the 1979 IEP was appropriate and would have been implemented by petitioners if Michael had not been placed in the Carroll School (Pet. A. 118a-119a). Supposedly, the District Court in the face of conflicting diagnoses had not stated which diagnosis it accepted: how then could it have decided that petitioners' IEP was appropriate? The court below held that the District Court should go back and choose a diagnosis (Pet. A. 119a-120a, 139a). It must have recognized, however, that this criticism of the District Court's decision was window-dressing. For one thing, the District Court had carefully explained that the differences in the diagnoses needed no resolution as they were no more than a matter of emphasis where there was substantial agreement

as to the manner of treatment (Pet. A. 61a). Its statement is fully borne out of the record.[5]

More important, there was not the slightest hint in the voluminous evidence received by the District Court that the differences in diagnoses would have made a difference in placement. See *Anderson* v. *Thompson*, 658 F.2d 1205, 1208 (7th Cir. 1981). The First Circuit simply had no basis to expect that a finding supporting one diagnosis over another, even if it was the diagnosis of the parents' expert,[6] would change the outcome and, thus, affect any right of the parents to damages.

The Court, therefore, mounted a far more prolonged attack on the District Court's decision. This attack centered on the District Court's failure to deal with certain violations of procedural rights found by the hearing officer to have occurred between 1977 and 1979 (Pet. A. 106a-112a). The District Court, it was ruled, should have decided whether these violations were in fact serious (Pet. A. 138a).[7] If they were, the Panicos were to be awarded damages in the amount of 1979-1980 tuition and related Carroll School expenses regardless of the adequacy of petitioners' 1979 IEP and, in all likelihood,

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[5] See the testimony of Dr. Levine at R.A. II, pp. 3-99 to 3-103, 3-106 (visual processing); R.A. II, pp. 3-104 to 3-105, 3-107 (attention problems); R.A. II, pp. 3-108 to 3-109 (anxiety); R.A. II, pp. 3-99, 3-109 (neurological basis); R.A. II, 3-110, 3-115, 3-131 (appropriate treatment). Compare with the testimony of Dr. Kinsbourne at J.A. 271-272, 278-279 (visual sequencing, processing); J.A. 269, 271-274 (attention); J.A. 269-270 (anxiety, depression); J.A. 273 (neurological basis); J.A. 268-270, 279-283 (appropriate plan for treatment). See also Dr. Kinsbourne's testimony at J.A. 391-395 and 400.

[6] The District Court did indicate a mild preference for the testimony of petitioners' expert (Pet. A. 61a).

[7] In the District Court the Department of Education had downplayed the importance of these violations and neither the Panicos nor the State mentioned them in their post-trial briefs (D. Ct. Docket entries No. 273 and 274). Indeed, the Department in its brief in *Burlington I*, argued at length (Bf. 15-17) that the findings of the hearing officer concerning procedural violations were "not central to [the decision] so as to taint and invalidate it." The only evidence at trial concerning the violations was offered by petitioners' expert who found the violations pertaining to the 1979-1980 placement not to be serious (J.A. 292-293). When it became clear at trial that Michael's teachers at the Carroll School were for the most part less experienced than Mr. McAleer, the question of the superiority of education at Carroll School was more or less abandoned. In their brief to the Court of Appeals, respondents again began to emphasize the violations found by the hearing officer (Brief for Doe, pp. 14-16; Brief for Dept. of Ed., pp. 13-20).

would be entitled to have petitioners pay for tuition and related expenses at the Carroll School for years subsequent to 1979-1980 (Pet. A. 137a-138a). The Court reasoned, moreover, that even if the procedural violations were not serious and the 1979 IEP was appropriate, the Panicos would be absolutely entitled to an award of damages for tuition from the date of the hearing officer's decision to the end of the 1979-1980 school year (Pet. A. 136a-137a) and, on the basis of "equitable considerations, might be entitled to damages for tuition in other periods (Pet. A. 124a).

Thus, the Court of Appeals awarded damages* absolutely with respect to the period from January 30, 1980 to the end of the 1979-1980 school year; and left open the possibility that the parents would be awarded damages; (a) from September, 1979 onward if the IEP was found to be inappropriate (Pet. A. 124a) or if the procedural violations enumerated in the hearing officer's report were found to be serious (Pet. A. 135a-137a); or (b) from January, 1980 onward even if the IEP was found to be appropriate (Pet. 136a-137a) and the violations were found not to be serious (Pet. 136a), provided that an equitable basis for the award could be found (Pet. A. 131a-132a, 137a-138a).[9] Petitioners take the position that none of these awards was appropriate.

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* In their brief in opposition to certiorari, respondents attempted to distinguish between "reimbursement," *e.g.*, allowing the Panicos to keep funds advanced under protest or requiring petitioners to reimburse funds expended by the Panicos, and damages. The distinction is without substance. Out-of-pocket costs are a frequent element of damages in tort law, D. Dabbs, *Law of Remedies* 392 (1973); F. Harper and F. James, *The Law of Torts*, 1311-1312 (1956), and a no uncommon element of damages in contract law, §§ 2-710 and 2-715 of the Uniform Commercial Code (1957) and official comments thereto. If petitioners are ordered to pay money to the parents or the parents are excused from repaying money to petitioners, the parents have been awarded damages. See *Miener* v. *Missouri*, 673 F.2d 969, 982 (8th Cir. 1982) *cert. den.*, 103 S.Ct. 215 (1982).

[9] The reason for this anomalous result is that the parents only received money for expenses incurred from February, 1981 onward. The Court of Appeals applied the "equitable considerations" test only to the issue of whether the parents would have to repay the money that they received. It was apparently not troubled by the lack of connection between the 1978-1979 period in which the equitable basis for allowing the Panicos to keep the money supposedly might be found and the 1981-1982 period for which they received the money.

We begin by asking whether Congress intended a remedy in damages under any circumstances.[10] Perhaps the most obvious evidence that Congress intended no damages to be awarded under EHA is the provision of 20 U.S.C. § 1415(e)(2) conferring concurrent jurisdiction of the district court to hear EHA claims. Congress must have been aware that in some EHA cases the only viable defendant would be a State or State agency,[11] see *e.g.*, *Department of Education* v. *Katherine D.*, 727 F.2d 809 (9th Cir. 1983); *Stock* v. *Massachusetts Hospital School*, 392 Mass. 205 (1984); *Fallis* v. *Ambach*, 710 F.2d 49 (2d Cir. 1983); *Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir. 1980) (decided under 29 U.S.C. § 794), and that the Eleventh Amendment bars actions for damages against a State in a Federal Court. *Edelman* v. *Jordan*, 415 U.S. 651, 662-667 (1974). The attempt to confer unconstitutional jurisdiction upon a court or to abrogate a State's immunity, is not lightly attributed to Congress. *Miener* v. *Missouri*, 673 F.2d at 981. As *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916) reminds us, "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

Secondly, Congress provided for extensive monitoring of State and local compliance with EHA law, 20 U.S.C. §§ 1412, 1413, 1417-1418 and for serious financial sanctions for non-

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[10] The First Circuit looked at damages as authorized only by Federal law (Pet. A. 107a-109a), although it strongly indicated that at least in part the conduct that gave rise to damages in this case was violative of State law (Pet. A. 108a, 110a-112a). In a previous case, *Doe* v. *Anrig (I)*, 692 F.2d 800, 812-813 (1st Cir. 1982), since overruled, *Doe* v. *Anrig (II)*, 728 F.2d 30, 31 (1st Cir. 1984), the First Circuit concluded that damages were not available under Federal law but conceivably were available under Massachusetts law. *Doe* v. *Anrig I* was correct in concluding that damages were not available under Federal law but wrong in considering the issue of their availability under State law. *Pennhurst State School and Hospital* v. *Halderman*, 104 S.Ct. 900, 917-921 (1984); *Smith* v. *Robinson*, 104 S.Ct. 3457, 3464 n.6 (1984).

[11] In actions for breach of duties owed to handicapped children under EHA law, it would appear to be almost impossible to fix blame on any particular person or persons. The responsibilities for recognizing and remediating or attempting to remediate handicaps are necessarily diffuse. Thus, actions for damages will end up, in most if not all instances, being brought against a governmental body rather than individuals and in more than a few instances against a State itself.

compliance. 20 U.S.C. §§ 1414(b)(2) and 1416(a). Such sanctions make private actions for damages superfluous; if Congress had intended to permit EHA to be enforced through private actions for damages, the administrative monitoring and sanctions would not have been necessary. "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *TransAmerica Mortg. Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 20-21 (1979) quoting *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929). As the Court stated in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 28 (1981):

> In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.

Thirdly, though the provisions of § 1415(e)(3) are not the focus of the present argument,[12] by requiring that parents not change a child's placement unilaterally while administrative or judicial proceedings were pending, Congress effectively ruled out the possibility that parents could obtain damages for expenses incurred in making a change of placement before the proceedings had terminated.

Finally, awarding damages for infractions of EHA law tends to divert the attention of parents and school authorities alike from what is the central purpose of EHA: the drafting and implementation of IEP's that will provide a handicapped child an adequate future education. *Board of Education* v. *Rowley*, 458 U.S. 176, 181-182, 188-189 (1982). If damages are available, certain school districts may find it cheaper and more convenient to take the risk of paying them than to set up programs that will provide an adequate education in the least

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[12] But see Argument III, *infra*.

restrictive setting mandated by Congress, 20 U.S.C. § 1412(5)(C) and Federal regulations, 34 C.F.R. 300.550(b).[13] On the other hand, parents, if they believe that the law affords them damages, may well look for self-help solutions instead of cooperating with local and State authorities to find a suitable public school placement.[14] The District Court in this case correctly focused its attention on the merits of the rejected IEP (Pet. A. 62a-63a, 66a) rather than on past incidents (Pet. A. n. at 60a) and found the rejected IEP totally appropriate (Pet. A. 66a).

The lower courts have generally construed EHA as not creating a cause of action for damages. *Marvin H.* v. *Austin Independent School Dist.*, 714 F.2d 1348, 1356 (5th Cir. 1983); *Mountain View-Los Altos Union High School Dist.* v. *Sharron B.H.*, 709 F.2d 28, 30 (9th Cir. 1983); *Powell* v. *Defore*, 699 F.2d 1078, 1081 (11th Cir. 1983); *Miener* v. *Missouri*, 673 F.2d at 979. At one time the First Circuit took the same position. *Doe* v. *Anrig (I)*, 692 F.2d 800, 812 (1st Cir. 1982); *Colin K.* v. *Schmidt*, 715 F.2d 1, 10 (1st Cir. 1983). However, in *Doe* v. *Brookline School Committee*, 722 F.2d 910, 917, 919-920 (1st Cir. 1983) another panel of the First Circuit, not sitting en banc, compare *County of Monroe* v. *United States Dept. of Labor*, 690 F.2d 1359, 1363 (11th Cir. 1982), "overruled" *Doe* v. *Anrig (I)*.

In *Mountain View*, 709 F.2d at 30, the Court observed:

> Damage remedies for placement before full compliance with EAHCA [EHA] procedures are not in keeping with the design of the Act. A damage action is usually associated with the breach of some duty, or creation of an unusual risk as by engaging in an ultrahazardous activity. Damages serve not merely to compensate an injured party

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[13] It was stipulated in the present case that the average cost to petitioners of educating handicapped children was $6050.00 in 1979-1980, $6361.00 in 1980-1981, and $7069.00 in 1981-1982 (J.A. 404).

[14] In the present case, the parents declined an invitation to visit Mr. McAleer's class in the Pine Glen School before the close of the 1978-1979 school year (J.A. 119, 168-169, 376) and rejected the IEP, at least according to one version of their story, because they were under the impression that the class was for emotionally disturbed children (J.A. 127-128, 169, 332, 374). The impression was mistaken (J.A. 227) as even the hearing officer noted (Pet. A. 7a).

but also act as an incentive for potential defendants to act prudently. See, *e.g.*, 42 U.S.C. § 1983. Damages under EAHCA would serve no purpose. The prudent school district need not do more than faithfully apply the procedures of EAHCA. The threat of damages in a case like ours would not make compliance any more likely, and would subject school districts to contingent liabilities hardly foreseeable when the annual school budget is prepared.

Indeed, this Court's opinion in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981), though decided under Title 42 U.S.C. §§ 6010, 6011, and 6063, pointed the way toward this holding since, as Justice Blackmun noted in his concurring opinion at p. 32, though the Court left "open for consideration on remand whether, and in what form, §§ 6011 and 6063 created rights that are enforceable by private parties," it strongly intimated that it would "not view kindly any future positive holding in that direction."[15] It would be difficult to distinguish between this case and *Pennhurst*. Both cases involve grants by Congress to the States to help alleviate the problems of a segment of society in need of assistance, and both involve certain directions to the States about how the grants will be used. Neither would seem intended to create any private or individual right to damages.

II. In Any Event None of the Circumstances Mentioned by the Court of Appeals Entitles the Parents to Damages.

A. *Reliance Upon the Hearing Officer's Decision.*

As we have already noted, the First Circuit ruled that the Panicos were absolutely entitled to be reimbursed for Michael's tuition and related expenses at the Carroll School from January 30, 1980, the date of the hearing officer's decision, to the end

[15] The question was still left open on *Pennhurst*'s second visit to this Court. 104 S.Ct. at 921 (1984).

of the 1979-1980 school year (Pet. A. 136a). It reasoned that the Panicos had a right to rely on the hearing officer's decision over that period, couching its ruling in the language of estoppel (Pet. A. 133a-136a).[16] The Panicos offered no evidence of such reliance. The usual rule is that where reliance is an element of a party's case, the burden is on that party to prove it.[17] See *e.g.*, *Pogue* v. *Retail Credit Co.*, 453 F.2d 336, 338 (4th Cir. 1972) *cert. den.*, 409 U.S. 1109 (1973). Not only did the parents offer no such proof at trial, but the evidence disproves any reliance on the hearing officer's decision as the basis for keeping Michael in the Carroll School over that period. The parents acted unilaterally in placing Michael in the Carroll School (J.A. 49, 119-120, 162-163; compare J.A. 359-362); they also kept him there for the next two years and declined any cooperation in petitioners' efforts at subsequent evaluations that could lead to a change in placement (J.A. 179-185).

Even if the parents had relied on the hearing officer's decision, their reliance was, as a matter of law, misplaced. They never received permission to change Michael's placement, and § 1415(e)(3) proscribed such a change while administrative or judicial proceedings were pending. See Argument III, *infra*. Petitioners brought their action in the District Court on February 26, 1981, less than thirty days after the hearing officer's decision was rendered. Reliance upon a right to violate Federal law, even where, unlike here, it is based upon the explicit

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[16] If by "estoppel," the Court meant to refer to the doctrine of equitable estoppel, such an argument would have bordered on the absurd. As Black's Law Dictionary, 648 (Revised 4th ed.) notes: "An estoppel arises when one is concluded and forbidden by law to speak against his own act or deed. *Gural* v. *Engle*, 128 N.J.L. 252, 25 A.2d 257, 261." At no time in this case have petitioners ever sought to speak against their own word or deed. If the reference was to estoppel by judgment (in this case, administrative decision), the short answer would be that no such estoppel operates with respect to a decision under review in the very proceeding in which review is sought. See *Maryland* v. *United States*, 381 U.S. 41, 53 n.38 (1965).

[17] The same is true of estoppel. *James Talcott, Inc.* v. *Associates Discount Corp.*, 302 F.2d 443, 446 (8th Cir. 1962) (Blackmun, J.).

advice of a Federal officer, is utterly unavailing.[18] *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981).

Finally, reliance on a decision, administrative or judicial, that is subject to further review, especially review as of right, is never, even if proven, an adequate basis for awarding damages. Doubtless, most persons who prevail at a lower level of the litigatory ladder expect that they will continue to prevail. If such expectations were not sometimes to be frustrated, all forms of administrative and judicial appeal or review would be meaningless.

B. *Damages Resulting from Procedural Violations or From Failure to Develop an Adequate IEP.*

It may be remembered that the Court of Appeals ruled that the Panicos might be entitled to total reimbursement if petitioners' violations of Michael's rights under EHA or related State regulations were serious or if the 1979-1980 IEP were found inadequate (Pet. A. 124a, 135a-137a, 138a). The latter eventuality is all but impossible on the present record. The Panicos' own expert at the administrative hearing, Dr. Lott, found the IEP adequate (R.A. III, pp. 93-95). His testimony was uncontroverted. The hearing officer herself made it reasonably clear that her rejection of petitoners' IEP was not based upon any defects in the IEP[19] but upon her perception that they could no longer be trusted to educate him (Pet. A. 13a). The District Court, of course, found petitioners' IEP would have afforded Michael a free public education in a less restrictive setting, see 20 U.S.C. § 1412(5)(B) and 34 C.F.R. § 300.550(b), than

[18] The First Circuit cited regulations (Pet. A. 135a) adopted by respondent Department of Education requiring immediate implementation of its decisions: 603 C.M.R. § 409.0. These regulations fly in the face of § 1415(e)(3) and, thus, are unenforceable under the Supremacy Clause.

[19] The hearing officer did attempt to raise the possibility that Mr. McAleer, who would have been Michael's teacher at the Pine Glen School, did not have adequate experience in teaching remedial reading to children like Michael (Pet. A. 14a). In light of the experience of Michael's teachers at the Carroll School, see R.A. II, pp. 4-37, 4-38, 4-60 to 4-62, 4-90, 4-91, most of whom were less experienced than Mr. McAleer (J.A. 225), any such basis for the decision was untenable. See Pet. A. 63a.

that chosen by the parents (Pet. A. 62a-63a, 66a). Whatever the remote possibility that yet another trial would produce yet a different decision on this point, damages for failure to produce an adequate IEP would seem to be out of the question in light of the high quality of the education that the judge found petitioners to have offered Michael.

The issue then is whether damages could be awarded as a remedy for procedural violations by "linking" (to use the word of the First Circuit) (Pet. A. 105a) them to the placement of Michael in the Carroll School. A major reason why, even if such violations could ever give rise to an action for damages, they would not do so here is that, as the First Circuit seemed to concede (Pet. A. 104a-105a), there was no evidence that these violations had caused Michael any damage in fact. It is a fundamental principle of law that violation of a legal right creates a remedy by way of damages only if as a consequence of that violation the party claiming them has suffered injury in fact. *Illinois C. R. Co.* v. *Crail*, 281 U.S. 57, 63 (1930). In the absence of the evidence of injury in fact to Michael,[20] stemming from the so-called procedural violations, they could not provide a basis for an award of damages.

A second reason why damages are inappropriate in the present case is that the incidents upon which they were for the most part remote from the rejected IEP and in their entirety facially trivial.[21] We consider these *seriatim*. As

[20] It may be that the Panicos suffered injury in fact when they were (allegedly) not informed that petitioners would pay for the 1977 medical assessment of Michael. Where the Panicos suggested the 1977 core evaluation, they were probably aware of their rights (J.A. 38-39). In any event, the District Court upheld that part of the hearing officer's order that petitioners pay the cost of the 1977 assessment (Pet. A. 67a-68a), and petitioners did not appeal that aspect of the judgment. (D. Ct. Docket Entry No. 311.)

[21] The First Circuit correctly observed that the District Court did not decide whether the violations were serious (Pet. A. 106a). On the other hand, as already noted, the only testimony bearing on this at trial came from petitioners' expert, and his testimony was that the incidents that actually pertained to the 1979-1980 placement were trivial (J.A. 292-293). Since his testimony came before that of the parents expert, Dr. Levine, one might have supposed that if he disagreed with petitioners' expert on this point, that disagreement would have been elicited by the parents' counsel on direct examination. 32A. C.J.S. p. 735. It was not. No testimony contradicting that of petitioners' expert on this point was presented.

was stated by the hearing officer (Pet. A. 17a-20a), they were:[22]

1. Exceeding in 1978-1979 a thirty-six month span in chronological ages of the children in the classroom where Michael would have been educated if the 1979-1980 IEP had been implemented. Mr. Foley, petitioners' coordinator of pupil services, pointed out that information on the chronological span of ages had been submitted by respondent Department of Education's compliance bureau and that petitioners had been found to be in compliance (R.A. III, pp. 378-379).

2. Two specialists' conducting evaluations of Michael of which the Panicos were not notified. The hearing officer's conclusion that the specialists were carrying out a core evaluation of Michael (prior to which the law does require that the parents be notified) was not merely wrong but plainly wrong (R.A. III, p. 442, 449, 455-456; J.A. 212). The core evaluation was not requested until Mr. Panico conferred with petitioners' Core Evaluation Administrator on May 19, 1979 (R.A. III, 386-387), or possibly as late as May 25, 1979 (J.A. 323).

3. Considering, in 1977, retaining Michael in the first grade prior to core evaluation, failing to issue, in 1977, an IEP or a finding of no special needs, and failing, again in 1977, to inform the Panicos of the availability of publicly paid outside medical assessment. See p. 11, *supra*. There is uncontroverted evidence that the reason why no IEP was drawn up after the June, 1977

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[22] We limit our discussions to those actually found by the hearing officer under the heading Regulatory Requirements (Pet. A. 17a), with the exceptions of number 7 (where petitioners were found in "substantial compliance") and number 9 which is discussed in fn 20, *supra*. The hearing officer pointed out that Michael's day would, because of his transportation schedule, be fifteen minutes shorter than the regular school day in Burlington (Pet. A. 9a, 17a) but did not find the shorter day to be a violation. Since the First Circuit states that the hearing officer had found that petitioners "violated numerous state and federal laws in handling the child's special educational plan" (Pet. A. 106a) we point out that the only references in the hearing officer's discussion of supposed violations of federal law are found in paragraphs 2 and 3 under the heading Regulatory Requirements (Pet. A. 17a, 18a), in which she states that the failure in 1977 to notify the parents before considering retention violated EHA. The hearing officer was wrong. There is no requirement in EHA that a child not be considered for retention until an educational plan has been prepared for him. Children may be retained for any number of reasons which have nothing to do with handicaps.

evaluation (see R.A. IV, pp. 1-47) was that no special needs had been indicated at that time (J.A. 198; R.A. III, pp. 401-402).

4. The failure of all persons who contributed to Michael's 1979-1980 IEP to attend the Core Evaluation Meeting. In fact, the school psychologist, Mr. Cavanaugh and Ms. Meade and Ms. Mason, language and learning specialists, were absent. Their written reports were shared with the parents. The hearing officer noted "extenuating circumstances" for their absences; they had met with the parents already. Moreover, Mr. Panico was urging petitioners' to proceed quickly (J.A. 323-324) apparently because of serious emotional problems that Michael was manifesting at home (J.A. 89-90, 319, 354-355; R.A. III, pp. 539-540).

5. Suggesting placement for 1979-1980 before the medical assessment was available. In fact, the Panicos were arranging for the medical assessment, first asking that no IEP be drawn until the assessment came in, then pressing Burlington school authorities to prepare an IEP without the assessment (J.A. 203-205).

6. Modifying the IEP for 1978-1979 without the parents' consent, the time that Michael would have spent in the learning center with his reading tutor, Ms. Black, supposedly having been unauthorizedly shared with another student. Once again, the hearing officer seems to have misunderstood the evidence. Michael was not required at any time to have a single period of the day during which he was the only student working with Ms. Black. That would have been a waste of Ms. Black's time, since part of Ms. Black's time would be spent in assigning Michael independent work to "reinforce" what she had immediately taught (R.A. III, p. 107; J.A. 200-201). He was, however, required to have one hour a day under her tutelage, and this he had at all times had from March of 1978 to June of 1979 (J.A. 222; R.A. III, pp. 107-108, 351-352, 445-446).

Whether these "violations" are considered separately or together, they add up to no more than petty housekeeping oversights. Accordingly, the First Circuit erred in remanding the case to the District Court to determine whether the violations were "serious." They are simply not "serious" enough, under any view of EHA law, to warrant an award of damages being based thereon.

Perhaps the First Circuit's error on this point is the result of its implicit holding (Pet. A. 138a) that serious procedural violations "constitute bad faith."[23] *If* damages can be awarded because local educational authorities have acted in "bad faith," such bad faith is not proven merely by the mere existence of procedural or substantive errors even if they are serious. In *Gildea* v. *Ellershaw*, 363 Mass. 800, 813-818, 822 (1973), the Supreme Judicial Court of Massachusetts held that a public officer, acting within his jurisdiction, is not liable "for mere negligence or errors in the exercise of judgment and discretion in the discharge of his duties." *Id.* at 822. In reaching this decision, the Court explicitly relied on a long line of Federal cases, 363 Mass. at 814-818, including *Spalding* v. *Vilas*, 161 U.S. 483 (1896); *Barr* v. *Mateo*, 360 U.S. 564, 571-572 (1959); and *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.). Bad faith is usually equated with actual malice, fraud and corruption. *Gildea* v. *Ellershaw*, 363 Mass. at 820. The record here is too totally devoid of malice, fraud or corruption on petitioners' part to make these points worthy of discussion.

In suggesting that *if* this Court decides that damages are to be awarded, it should restrict them to instances of malice, fraud, or corruption, petitioners reiterate that damages are not the point of EHA, which was enacted to provide for each handicapped child a free appropriate education. Such an education means "specially designed instruction, at no cost to parents to guardians, to meet the unique needs of a handicapped child. . ." 20 U.S.C. § 1401(16), quoted in *Board of Education* v. *Rowley*, 458 U.S. at 188. When damages to one child are awarded out of public funds, they simply diminish amounts available for the education of other children. See *Age* v. *Bullitt County Public Schools*, 673 F.2d 141, 145 (6th Cir. 1982); *Rettig* v. *Kent City School Dist.*, 539 F.Supp. 768, 777 (N.D. Ohio 1981) and cases cited. The field of special education is complex, and the States, or at least the Commonwealth of

[23] This aspect of the right to damages was also supposedly derived from *Anderson*, 658 F.2d at 1214. *Anderson*, however, refers to a school board's failing to comply with the procedural provisions of EHA "in an egregious fashion." There is an obvious difference in emphasis between the language of *Anderson* and that of the First Circuit in this case.

Massachusetts, and the Federal government have enacted numerous procedural and substantive regulations presumably designed to further the goals of EHA. See 34 C.F.R. §§ 300.1-300.395; 603 C.M.R. §§ 100.0-1005.0. Even experts may differ widely on what is the best IEP for a particular child. See, *e.g.*, *Rowley*, 458 U.S. at 207 n.29. In these circumstances it is hardly surprising that local school districts sometimes fail to dot the i's or cross the t's or that an IEP is on review occasionally found less than adequate. Awarding damages for such failures, as the Ninth Circuit pointed out in *Mountain View*, 709 F.2d at 30, will not provide any incentive to avoid repeating them. Punishing "dishonest mistakes" may (or may not) encourage school authorities to get rid of their perpetrators; punishing honest ones will only impoverish State and local school districts.

C. *"Equitable" Considerations.*

Not content to award "reliance" damages to the parents and to suggest the award of damages based on possible defects in the IEP or the seriousness of the procedural violations of Michael's rights,[24] the court below held that no matter how trivial the violations and how adequate the IEP, the Panicos could still recover damages, *i.e.*, be excused from reimbursing petitioners for funds received, if it was "equitable" that they should be excused (Pet. A. 124a, 137a). About what circumstance would make it equitable for the Panicos to recover such damages, the Court said little, pointing specifically only to whether they had asked for permission to enroll Michael in the Carroll School (Pet. A. 131a-132a, 133a).[25] The implication, intended or not, was that parents who reject an IEP later found appropriate are entitled to damages because they asked permission to do what they should not have done. In effect, the First Circuit has said to local school authorities and, by extension of the same logic, to State authorities that they be

[24] Since neither respondent offered evidence at trial to show that the IEP was defective or that the violations were serious, the remand to determine these matters (Pet. A. 138a, 139a) was particularly inappropriate. *Whittaker Corp.* v. *Execuair Corp.*, 736 F.2d 1341, 1346 (9th Cir. 1984).

[25] See n.4, *supra*.

made to pay damages for saying when they should have said no.[26] If this result is founded upon some principle of equity jurisprudence, it is one of which petitioners are totally unaware. Other general bases for an "equitable" award of damages mentioned below, *i.e.*, the reasonableness of the position of the party seeking damages and his compliance with EHA law pending review (Pet. A. 137a-138a), address the substantive and procedural issues presented in all EHA cases. Parents can expect no damages under EHA because their position was "reasonable" or because they complied with the law, although in this case the parents rather plainly did not. See Argument III, *infra*.

The whole concept of an equitable award of damages in a case of this type flies in the face of all principles of equity. There are, to be sure, certain maxims of equity that may be asserted to bar relief to one who has otherwise made out a case for it. These maxims include stale demands,[27] unclean hands,[28] and the failure to pursue legal, administrative or statutory remedies.[29] But we have never heard of such defenses being used as a basis to grant relief. Moreover, even in equity, money damages, if appropriate, are usually granted as of right. See generally, H. McClintock, *Principles of Equity*, § 23 (1948); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

The court may have been confused by the circumstance that, here, petitioners seek reimbursement from the Panicos.[30] But this is, as we have already noted, reimbursement of moneys

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[26] We shall not even try to predict where this logic would lead if it were applied to the law of torts and contracts and to equitable and statutory remedies.

[27] See *Barnette* v. *Wells Fargo Nevada Nat. Bank*, 270 U.S. 438, 444-445 (1926).

[28] See *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 387-388 (1944). It is arguable that petitioners' § 1415(e)(3) defense is analogous to the defense of unclean hands. See Argument III. If so, it is properly asserted as a defense, not as a basis for relief.

[29] See *Schoenthal* v. *Irving Trust Co.*, 287 U.S. 92, 94-95 (1932).

[30] The reference in the opinion (Pet. A. 133a) to *Doe* v. *Anrig (II)*, 728 F.2d 30 (1st Cir. 1984), suggests such confusion. In *Doe*, it was the parents who were seeking reimbursement, *i.e.*, damages for costs incurred in making a proper placement after they rejected an inappropriate IEP. See *Doe* v. *Anrig (I)*, 692 F.2d 800, 803 (1st Cir. 1982). It was improper for the Court to have awarded any damages in *Doe (II)*, but, assuming the contrary, one can understand why the court, in light of 20 U.S.C. § 1415(e)(3), ruled that the right to damages was not absolute but discretionary.

paid out under protest, see Judge Aldrich's opinion at Pet. A. 71a, with the strict understanding that if petitioners prevailed, they would be repaid. See *Burlington I*, A. 40a, and construction of it found in 5 Shepard's *Causes of Action* 619, 677 (1984). To allow the parents to keep these monies is to award them damages. The situation of parents seeking damages for an inappropriate placement, whether these damages are called "reimbursement" or by any other name, is entirely different from that of a municipality seeking to be reimbursed after it has been forced to pay for an inappropriate private placement on threat of losing its Federal EHA funding. The "reimbursement" sought by petitioners in this case is not in the nature of damages to them, but merely a return of what ought never to have been received. No "equitable" principle could defeat petitioners' right to such reimbursement.

D. *Damages for Years Beyond that for Which an IEP is Drawn.*

Finally, petitioners submit that in no case can damages ever be awarded, as the First Circuit held they could be in the instant case (Pet. A. 123a-124a), for years for which no IEP has been drawn. The whole concept of EHA, as this Court took pains to point out in *Rowley*, 458 U.S. at 181-183, involves the drawing of an IEP, subject to review by an impartial hearing officer and further, more limited review by a court of competent jurisdiction. It is no doubt true that in most cases judicial review of the IEP will not have been concluded by the end of the school year to which it applies.[31] But that does not mean that if the parents and local educational authorities disagree about placement in subsequent years, a new IEP cannot be subject to the same review as the previous IEP.

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[31] This is not to say that all review (except appellate review) is inherently incapable of being concluded within one year. Most courts have the power to control their own dockets and to push urgent cases toward speedy resolution. The power given to the Federal Department of Education to enact regulations, 20 U.S.C. § 1417(b), almost certainly includes the power to require State administrative agencies to hear EHA cases with dispatch. See 34 C.F.R. § 300.512(b); 603 C.M.R. § 403.0.

When State or local educational agencies are required to respond to an educational placement which they have never been able to evaluate or discuss, much less approve or disapprove, in light of the child's current needs, the whole administrative machinery contemplated by EHA is frustrated and EHA becomes nothing more than a statutory action for damages. If agencies responsible for the drawing of a new IEP neglect or refuse to do so, the sanctions contemplated by 20 U.S.C. §§ 1414 and 1416 should be promptly applied.

Here, however, the Panicos frustrated the drawing of a new IEP. Through their attorney, on August 21, 1980 they stated that they would not provide petitioners with "reports or other information" (J.A. 183). Admittedly the initial noncooperation was in connection with a request for a ten month evaluation. To the extent that the First Circuit implied that a ten month evaluation is permissive rather than mandatory (Pet. A. 123a), it was in error. 603 C.M.R. § 333.0. Four months later, on December 7, 1980, the Panicos demanded that an IEP be drawn (J.A. 184). They even offered to make records available to help petitioners to draw an IEP. However, a condition attached to the offer was that "the persons compiling the information and drafting of the plan be not adversaries in any court proceeding or under the influence of an adversary." (J.A. 185.) In other words, no employee of or consultant to the Burlington public schools could participate in drawing an IEP. Petitioners rejected any scheme under which, in order to draw an IEP for Michael, they would effectively have had to hire a team that had no connection with their public schools. To justify that rejection one need not look beyond the point that the type of "team" demanded by the parents would have violated State and Federal law. 34 C.F.R. § 300.347(a) and 603 C.M.R. § 311.0 *et seq*. This, therefore, is a totally inappropriate case in which to award damages for any year after 1979-1980.

III. In Any Event, Where Parents Unilaterally Change the Placement of a Child from a Public to a Private School While EHA Proceedings are Pending, They Forfeit the Right to Any Relief, Administrative or Judicial, by Way of Damages or Otherwise.[32]

Congress has at least by implication, and explicitly in 20 U.S.C. § 1400(b)(4) and (6), shown a preference that handicapped children be educated in the public schools. That is to say, in 20 U.S.C. § 1414(a)(1)(c)(iv) Congress has required that "to the maximum extent practicable" local educational agencies must offer programs to enable handicapped children "to participate in regular educational programs", and § 1412(5)(b) requires every state to formulate "procedures to assure that . . . handicapped children . . . are educated with children who are not handicapped." The vast majority of American children are educated in the public schools. See Select Committee on Children, Youth and Family, *U.S. Children and Their Families*, p. 21 (U.S. Govt. Printing Office, 1983), where it is stated that the total enrollment in 1981 in grades K-12 in regular public and private schools was 45,190,000; enrollment in private schools as a percentage of total enrollment was 11.6% for grades K-8 and 9.8% for grades 9-12.[33]

Congress was presumptively aware of this fact when it enacted these statutes. *United States* v. *Champlain Refining Co.*, 341 U.S. 290, 296 (1951); *Ranes* v. *Office Employees International Union*, 317 F.2d 915, 918 (7th Cir. 1963). Although Congress most certainly did not make the education of handicapped children in the public schools mandatory, these

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[32] This argument is plainly related to arguments I and II. If 20 U.S.C. § 1415(e)(3) is construed to bar a unilateral change of placement, either absolutely or in the circumstances of this case, the parents can obtain no damages for expenses incurred in changing Michael's placement. Moreover, § 1415(e)(3) cuts off not merely the right to damages but to prospective relief as well, where the relief is plainly related to an unlawful change of placement. *Rowe* v. *Henry County School Bd.*, 718 F.2d 115, 117-118 (4th Cir. 1983). It is entirely possible to rule that, however § 1415(e)(3) is construed, EHA creates no right to damages.

[33] It is exceedingly unlikely that these statistics would have been significantly different in 1975 when EHA was enacted.

provisions, implemented by regulation, 34 C.F.R. § 300.550(b)(1), make education in the public schools for handicapped children the likeliest eventuality. Moreover, the the legislative history of EHA contains many references to "free appropriate public education" and "public education for handicapped children." 121 Cong. Rec. H. 37024, 37025, 37027, 37028, 37030 (November 18, 1975); 121 Cong. Rec. S. 37413, 37414, 37418 (November 19, 1975). Perhaps the most succinct statement elucidating the purpose of EHA, see 20 U.S.C. 1400(c), was that of Representative Mink at 121 Cong. Rec. H. 37030: "Handicapped children have the same right as a nonhandicapped child to participate in our public school system and enjoy the benefits of a public education." Petitioners attempted to educate Michael in a public school, the Pine Glen School, when they drew the 1979-1980 IEP, and further made provisions for "mainstreaming," integrating Michael into activities with nonhandicapped children (J.A. 210, 238; Pet. A. 16a).

Whereas the will of Congress was that handicapped children be, if possible, educated in the public schools, *Rowley*, 458 U.S. at 189, parents of such children appear in numerous instances to prefer that they be educated in private schools. Indeed, the majority of reported EHA cases involving placement seem to involve a conflict between a parental preference for private education and the preference of local or state school authorities for public education. See Addendum. The reasons why so many parents prefer private education are open to speculation. In part, the cachet that private education enjoys with respect to the education of nonhandicapped children may carry over in some minds to the education of handicapped children.[34] Perhaps, since in practice the parents often select the private school at which their handicapped child is educated, they may feel that they have more to say about their child's education even though a third party is paying the tuition. Finally, because more learning-disabled children begin their

[34] Almost certainly influenced by adult conversations that he had heard, even Michael formed opinions in this regard. See J.A. 48. Compare J.A. 346.

careers in the public schools[35] and because learning disabilities remain difficult to remedy and frustrating for parent and child alike,[36] the public schools may well become the lightning rod

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[35] See *Fifth Annual Report to Congress on the Implementation of Public Law 94-142*: "The overall percentage of handicapped children served in regular schools, whether in regular or separate classes has remained relatively constant at more than 92% since P.L. 94-142 was enacted." Page xv (Division of Educational Services Special Education Programs, U.S. Department of Education, 1983).

[36] Learning disabilities are generally agreed to be persistent. Even as an adult a childhood dyslexic will generally remain a relatively poor reader and word speller. Carter, R.P.A., A descriptive analysis of the adult adjustment of persons once identified as disabled readers. Unpublished doctoral dissertation, University of Indiana, Bloomington, 1964. As cited in B. Herjanic and E. Penic, Adult outcome of disabled child readers. *Journal of Special Education*. 1972, *6*, 397-410. Dykman, R.A., Peters, J.E. and Ackerman, P.T., Experimental approaches to the study of minimal brain dysfunction: A follow-up study. *Annals of the New York Annals of Science*, 1973, *205*, 93-108. Gottesman, R., Belmont, I., and Kaminer, R., Admission and follow-up status of reading disabled children referred to a medical clinic. *Journal of Learning Disabilities*, 1975, *8*, 642-650. Hardy, M.E., Clinical follow-up study of disabled readers. Unpublished doctoral dissertation, University of Toronto, Canada, 1968. As cited in B. Herjanic and E. Penick, Adult outcome of disabled child readers. *Journal of Special Education*, 1972, *6*, 397-410. Howden, M.E., A nineteen-year follow-up study of good, average and poor readers in the fifth and sixth grades. Unpublished doctoral dissertation, University of Oregon, Eugene, 1967. As cited in B. Herjanic and E. Penick, Adult outcome of disabled child readers. *Journal of Special Education*, 1972, *6*, 397-410. Kline, C.L., The adolescents with learning problems: how long must they wait? *Journal of Learning Disabilities*, 1972, *5*, 127-144. Muehl S. and Forell, E.R., A follow-up study of disabled readers: Variables related to high school reading performance. *Reading Research Quarterly*, 1973, *9*, 110-123. Rourke, B.P. and Orr, R.R., Prediction of the reading and spelling performances of normal and retarded children: A four-year follow-up. *Journal of Abnormal Child Psychology*, 1977, *5*, 9-20. Rutter, M., Tizzaro. J., Yule, W., Graham, P. and Whitmore, K., Isle of Wight Studies, 1964-1974. *Psychological Medicine*, 1976, *6*, 313-332. Spreen, O., Neurospsychology of learning disorders: Post conference review. In R. Knights and D.J. Bakker (Eds.), *The Neuropsychology of Learning Disorders: Theoretical Approaches*. Proceedings of NATO Conference. Baltimore, Maryland: University Park Press, 1976.

The more comprehensive, representative and well defined the childhood sample, better controlled the design and longer the period of followup, the worse is the dyslexic and group educational outcome. Schonhaut, S and Satz, P., Prognosis of the Learning Disabled Child: A review of the Follow-up Studies. In Rutter, M. (Ed.) *Developmental Neuropsychology*. Guilford Press, 1983. It is not that poor readers altogether fail to improve their reading skills over time. They do, to the extent that few reach their adult years totally

that attracts the anger and hostility to which frustration so often leads. Yet there is no evidence that private schools for children with learning disabilities have better success in remediation than public schools. Indeed, in this case there was uncontroverted evidence that by the time of trial Michael had progressed at no greater rate in his three years at the Carroll School than he had in his three years at petitioners' Memorial School (J.A. 396-397, referring to Df.'s Ex. 15, R.A. I, pp. 253-254, R.A. II, p. 3-151). This is truly amazing when one recalls that at the Memorial School he was receiving only one hour per day of specialized instruction (R.A. IV, p. 340). Thus, whatever may be the reason for the parental preference for private rather than public education of handicapped children, neither the facts of this case nor any evidence of a more general nature indicates that private schools generally offer superior education to handicapped children.[37]

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illiterate. But also, few achieve normal reading levels at any age. Scarborough, H.S., Continuity between childhood dyslexia and adult educational reading. *British Journal of Psychology*, 1984, *75*, 329-348. When, as in the case of Michael, a child's learning disability is complicated by an attention deficit (see testimony of medical experts both for plaintiff and for defendant), the prospects for successful remediation are less yet. The persistent nature and negative implications of this condition are by now thoroughly documented. Thorley, G., Review of Follow-up and Follow-back Studies of childhood hyperactivity. *Psychological Bulletin*, 1984, *96*, 116-132. These include unsatisfactory educational outcomes. Borland, B.L. and Heckman H.K., Hyperactive boys and their brothers: A 25 year follow-up study. *Archives of General Psychiatry*, 1976, *33*, 669-675. Hoy, E., Weiss, G., Minde, K., and Cohen, H., The hyperactive child at adolescence: Cognitive, emotional and social functioning. *Journal of Abnormal Child Psychology*, 1978, *6*, 311-324. Minde, K., Lewin, D., Weiss, G., Laviguer, H., Douglas, V. and Sykes, E., The hyperactive child in elementary school: A 5 year, controlled, follow-up. *Exceptional Children*, 1971, *38*, 215-221.

[37] Of course, there may be instances in which a particular private program is better than a particular public program for a particular child. Such instances, however, do not appear to add up to any meaningful statistical showing of over-all superiority. When a learning disabled child is shifted from the educational mainstream to an institution specialized in remedial education, his educational prospects are not necessarily improved. A recent and particularly well controlled study found the following typical outcome: the dyslexics as a group functioned well below norms in reading; those remediated at a prestigious remedial resource fared no better than the rest. Bruck, M., The adult functioning of children with specific learning disabilities. *Final Report to Health and Welfare Canada, Health Programs Branch* (Project Grant 6605-1508-44). Presented August, 1981.

Between parents desiring private education for their handicapped children and local (and often State) educational agencies, perhaps with an eye on the public fisc, preferring public placement, stand the provisions of § 1415(e)(3). This statute forbids a change of placement while administrative or judicial proceedings are pending unless the change is agreed to by the parents and the appropriate local or State educational agency. For reasons that petitioners will discuss, this statute was correctly construed by several courts, beginning with the Fourth Circuit in *Stemple* v. *Board of Education of Prince George's County*, 623 F.2d 893, 897-898 (4th Cir. 1980) *cert. den.*, 450 U.S. 911 (1981). *Stemple* and its progeny basically hold that parents who, without permission, remove a handicapped child from a mandated public placement to a private one while administrative or judicial proceedings are pending forfeit all right to relief under EHA.[38] However, before coming to that point, petitioners believe it prudent to discuss two points raised but not decided by the First Circuit in the present case.

A. *What is the "Current Placement" for Purposes of § 1415(e)(3)?*

In June of 1979 when the rejected IEP was drawn, Michael was finishing his third-grade year at Memorial School. The rejected EIP would, of course, have placed him in Mr. McAleer's class in Pine Glen for the subsequent year. The Panicos never indicated the slightest desire to have Michael returned to the Memorial School — indeed, a major part of their case before the hearing officer consisted of allegations about how detrimental the Memorial School had been for Michael (J.A. 41-42, 44, 45, 48-49, 64, 81-83, 90-91, 110, 113-114) — and, thus, this Court might prudently save for another day the issue of a change of placement opposed by parents who favor the immediate prior placement. See *Concerned Parents* v. *New York City Board of Education*, 629 F.2d 751, 754 (2d Cir.

[38] Indeed, the *Stemple* decision can be read in jurisdictional terms: after an illegal change of placement neither a hearing officer not a court has jurisdiction to grant relief. 623 F.2d at 896-898.

1980); *Tilton* v. *Jefferson County Board of Education*, 705 F.2d 800, 804 (6th Cir. 1983). If, however, the Court should reach the issue, on the facts of this case petitioners submit that the current placement the Panicos had no right to change was the placement at the Pine Glen School mandated by the 1979-1980 IEP.[39]

This position is supported by numerous grounds. First, as already noted, neither petitioners nor respondents ever favored keeping Michael in the Memorial School. To read § 1415(e)(3) as requiring a child to stay in a placement that neither the parents nor the local school authorities approve is to give it a construction that is close to absurd. Absurd results in the construction of a statute are to be avoided. *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

Secondly, the IEP under which Michael received instruction in the Memorial School had by its own terms expired on March 23, 1979 (R.A. IV, p. 190).[40] Thus, there was no effective placement in effect when the new IEP was drawn up. In *Mountain View*, 709 F.2d at 29, where § 1415(e)(3) was also applied to bar reimbursement to parents who had unilaterally placed their child in a private school, the private school placement was made at a time when there was for all intents and purposes no placement in effect. Analogously, the placement at Pine Glen under the rejected IEP was the only placement in effect when Michael was enrolled in the Carroll School.

This factor leads directly to the next reason for regarding Pine Glen as the "placement" that should not have been changed unilaterally under § 1415(e)(3). The Pine Glen placement was supposed to take effect in September of 1979 after the close of the 1978-1979 school year. The end of a school year marks a time when placements might often change automatically for all children in public schools, handicapped or not. The change may be the result of a child's reaching a grade or chronological age at which he would no longer remain in a particular school.

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[39] This was the view of Judge Aldrich (Pet. A. 82a-84a), who noted that the assumption that the Carroll School was the "current . . . placement" appeared to be a mistaken impression of the facts (Pet. A. 83a).

[40] This IEP had been approved by the Panicos (R.A. IV, p. 341).

Anderson v. *Thompson*, 658 F.2d at 1208 n.4. Since, as we have already noted, handicapped children are as far as possible to be educated as they would be if they were not handicapped, mandating another placement to take effect at the beginning of a new school year is not to be regarded necessarily as a change in placement. *See* 603 CMR 333.0.

Fourth, and perhaps most important, no proceedings, administrative or judicial, were pending when the 1979-1980 IEP was adopted. In the present case, because the parents enrolled Michael in the Carroll School during the summer recess, the placement mandated by the IEP never took effect. But this was also the case in *Monahan* v. *Nebraska*, 645 F.2d 592, 597 (8th Cir. 1981) and *Rowe* v. *Henry County School Bd.*, 718 F.2d 115, 116-117 (4th Cir. 1983), cases cited by the First Circuit as being in accord with *Stemple* (A. 127a) and in which § 1415(e)(3) was applied to bar reimbursement to the parents. Proceedings were plainly pending when Michael commenced his studies at the Carroll School in September, 1979. (J.A. 28, 30, 34, 35). The words "*then* current placement" (emphasis supplied) in § 1415(e)(3) almost certainly refer to the placement in effect or scheduled to take effect when proceedings are commenced. Indeed, the *Stemple* court explicitly held that any change of placement by the parents after an IEP is adopted but before any proceedings are pending violates § 1415(e)(3). 623 F.2d at 898.

B. *What Constitutes Permission to Change an Existing Placement?*

The Court of Appeals found it unnecessary to rule on the contention that the January, 1980 decision was a retroactive agreement that Michael be placed in the Carroll School (Pet. A. 132a). Even if the Court had adopted this view, its decision would have been contrary to that of *Mt. View*, 709 F.2d at 30. We assume that under the law of contracts an agreement may, if the parties so state, operate retroactively. But the word "agree" cannot be wrenched from the language of § 1415(e)(3). As this Court said in *United States* v. *Morton*, 104 S.Ct. 2769,

2773 (1984): "We do not . . . construe statutory phrases in isolation; we read statutes as a whole." If § 1415(e)(3) permitted parents to "agree" retrospectively, by prevailing at state administrative hearings or perchance by prevailing in proceedings under § 1415(e)(2), it would mean exactly what *Stemple* and other cases have said that it does not mean: that parents may unilaterally place their handicapped children in private schools and hope that somewhere along the way their decision to do so will be "ratified." All of the reasons marshalled against the First Circuit's position that self-help is permissible, see pp. 45-52, *infra*, apply equally to the position that there can be retroactive agreement. Indeed, either position is contrary to 34 C.F.R. § 300.347(a)(1) and (2), which provides that before there is a lawful placement in a private school, *i.e.*, one approved by state or local authorities, there must first be a meeting to develop an IEP in which a representative of the private facility participates. No such meeting can occur when parents resort to self-help and hope for retroactive agreement.[41] This Court has just noted that EHA regulations adopted by a Department of Education "are

[41] Massachusetts does not seem to have provided for state-authorized agreements to change the placement after administrative hearings have been completed. Compare 603 C.M.R. § 327.1 (allowing for good cause change of placement of child in regular program on request of parents or school committee pending administrative proceedings). But see 603 C.M.R. § 327.2 (placement of child, like Michael, in special education program should, pending administrative proceedings, be in regular program at parents' request, which is subject to review at the behest of the school committee). There appears to be no provision for state authorities to agree to place a child who is already in a special education program in a different special education program while administrative or judicial proceedings are pending. Massachusetts General Laws c. 71B, § 10 seems to address only the situation in which both the parents and the school committee agree on private education. It may be that Massachusetts has adopted no regulations providing for State agreements with parents concerning placement pending § 1415(e)(2) proceedings because it takes the position, see 603 C.M.R. § 409.0, that immediate implementation of administrative decisions is required. That position, however, is in conflict with § 1415(e)(3) and, therefore, untenable under the Supremacy Clause. *Florida* v. *United States*, 292 U.S. 1, 12 (1934). It is at least conceivable that a state agency, even having decided that a private school placement was superior to a proposed public school placement, would nevertheless, if permission-granting machinery were in place, refuse to grant permission to change the placement pending judicial review, giving some consideration to the possibility that the administrative decision would not be upheld and the change in placement would be only temporary. See and compare the first sentence of Title 5 U.S.C. § 705; *Abrahamson* v. *Hershman*, 701 F.2d 223, 225 (1st Cir. 1981).

entitled to deference." *Irving Independent School Dist.* v. *Tatro,* 104 S.Ct. 3371, 3377 (1984).

Since the Panicos changed Michael's placement and did so without permission, this case presents the question ,"squarely", to use the word used by the First Circuit (Pet. 127a), of the implementation to be given to § 1415(e)(3) in EHA cases. The language of § 1415(e)(3) is categorical in form. During the pendency of any proceedings conducted pursuant to § 1415, unless there is agreement to the contrary, "the child shall remain in the then current placement." Congress could hardly have used clearer language. The First Circuit concluded, however, that this language "is directory rather than mandatory" (A. 129a). In part its construction derives from a statement in the legislative history "wherein a Conference Committee Senator explained that the Committee felt that 'a placement or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus the conference adopted a flexible approach.' 121 Cong. Rec. 37412 (November 19, 1975)" (Pet. 128a.). When the Court below claimed that this was "the only Legislative history directed to § 1415(e)(3)" (A. 128a), it was plainly in error. At 121 Congressional Record 37416 (November 19, 1975) the following statement by Senator Williams appears:

> The provisions of existing law with respect to the binding effect of due process hearings and appropriate administrative and judicial review of such hearing are clarified and language is also adopted to require that during the pendency of any administrative or judicial proceedings regarding a complaint, unless the State or local educational agency and the parents or guardian of the child otherwise agree, the child involved in the complaint shall remain in his or her present educational placement.

There is nothing in the statement quoted in the Opinion of the First Circuit that is inconsistent with this later statement or, indeed, with the actual language of § 1415(e)(3). Moreover, this Court has admonished that "one isolated remark by a single Senator, ambiguous in meaning when examined in context, is

insufficient to establish" the will of Congress. *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982). The First Circuit was also in error when it stated (Pet. A. 127a): "The rule the Fourth Circuit adumbrated in *Stemple* . . . was an interpretation of § 1415(e)(3) in opinions which did not rely on either the Act's legislative history or the structure and purposes of the Act as a whole." In fact, the Fourth Circuit in *Stemple* gave careful consideration both to the purpose of the act and its Legislative history. 623 F.2d at 896-897.

Courts that have followed *Stemple*, have generally pointed, correctly, to the unequivocal language of § 1415(e)(3). *Monahan* v. *Nebraska*, 645 F.2d at 598; *Zvi D.* v. *Ambach*, 694 F.2d 904, 906 (2d Cir. 1982); *Rowe* v. *Henry County School Board*, 718 F.2d at 117-119; *Marvin H.* v. *Austin Independent School Dist.*, 714 F.2d at 1353. Courts that have attempted to supply a reason why § 1415(e)(3) should bar any relief to those who violated its express terms have noted that there is no other means of implementing its provisions, *Stemple*, 623 F.2d at 597, that EHA was intended to further parental cooperation rather than unilateral action, *Scokin* v. *Texas*, 723 F.2d 432, 439 (5th Cir. 1984), and that self-help transfers to private schools followed (as they almost invariably seem to be) with a request that the public bear the cost pose a huge expense to the local or State treasury, all the worse for being unforeseeable to those who prepare school budgets. *Mountain View*, 709 F.2d at 30. See *Age* v. *Bullitt County Public Schools*, 673 F.2d at 145.

These reasons are cogent enough, but they do not exclude other reasons that Congress may have had. First, by confronting hearing officers and judges with a *fait accompli*, parents, especially those unable to afford private education without help, may arouse a sympathy that will cause these cases to be decided on the basis of the financial predicament in which the parents will find themselves if they do not prevail and, concomitantly, the likelihood that the child's education will be interrupted in the middle of the school year by the refusal of public funding. In the present case, one may surmise that the hearing officer might, in her own words, "have acceded to [petitioners'] suggestion to try the new program" (Pet. A. 13a), *if* Michael had

not already been attending the Carroll School by the time the hearings began.

Second, § 1415(e)(3), by acting as a brake on hasty or ill-considered action, allows, even in cases in which an IEP does not provide an appropriate placement, for consideration of alternative public or private placements that may be better than that contemplated by the parents or the local educational agency and may have occurred to neither of them. Once a unilaterally chosen placement has taken effect, the battle will almost certainly be between the placement contemplated by the IEP and that chosen by the parents, with all other alternatives duly ignored.

Third, Congress may well have reasoned that the only parents who could take the financial risk and make the initial investment involved in enrolling a child in a private school are those of means. Since self-help would only benefit a respectively small segment of the population, Congress may have considered it appropriate to bar it altogether, especially since one of the avowed purposes of EHA was to bring the benefits of a free appropriate education to all handicapped children, regardless of means. 20 U.S.C. § 1400(c); Joint Statement of the Conference Committee, U.S. Code Cong. and Admin. News 1482 (1975).

If Congress acted for any of these reasons, it acted rationally. But several courts, including the First Circuit in this case, have purported to find reasons why Congress did not mean what it said in (e)(3) or, at least, meant less than what it said. The First Circuit buttressed its position that 1415(e)(3) is intended to be directory rather than mandatory by pointing out that some school districts might deliberately use the rationale of *Stemple* and like cases to avoid their duties to diagnose and place handicapped children and that the financial risks involved in placing a child in a private school that was later found to be inappropriate was a sufficient deterrent to a hasty or ill-conceived transfer (Pet. A. 129a-131a). Addressing the former point, we point out that there is no basis for a belief that local

local educational authorities will so frequently and deliberately disregard their duties toward handicapped children under Federal law that self-help is the only practicable remedy. All presumptions are to the contrary. *O'Shea* v. *Littleton*, 414 U.S. 488, 496-497 (1974); *Rizzo* v. *Goode*, 423 U.S. 362, 370 (1976). Moreover, such wholesale deviation from law is, on account of its very magnitude, best remedied by the sanctions of §§ 1414 and 1416, and not by individual self-help.

The argument that the financial risk involved in making a private school placement later found to have been unwarranted is a sufficient deterrent ignores the problem that by taking the risks the parents, at least in some cases, shift the balance in their favor. As the petitioners have already implied, it is simply easier for a hearing officer or a judge to reach into the presumably "deep pockets" of municipalities and States than it is to saddle the parents with paying for private education once the necessity of paying for it is an established fact. More than that, Congress could have allowed self-help to parents dissatisfied with local- or State-mandated placement and allowed them the financial risk of non-reimbursement if the self-help proved inappropriate. However, in § 1415(e)(3) Congress chose to prohibit self-help. To decide that the risk of non-reimbursement might satisfy whatever objectives Congress had with respect to the prohibition of § 1415(e)(3) is, quite simply, to rewrite the statute. Such legislation is entirely beyond the power of the courts. See Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892, 894-895 (1982). As Justice Frankfurter wrote in *Sixty-two Cases, More or Less, Each Containing Six Jars of Jam* v. *United States*, 340 U.S. 593, 596 (1951): "After all, Congress expresses its purpose by words. It is for us to ascertain — neither to add nor to subtract, neither to delete nor to distort."

It would appear, however, that the First Circuit in this case concluded that even if (e)(3) is read as mandatory, two exceptions permitting self-help should be read into it (Pet. A. 130a and 138a). One involves a situation in which a child is suffering irreparable damage by being forced to remain in his current

placement pending administrative hearing (Pet. A. 130a).[42] Curiously, in what appears to have been the earliest appellate case to have adumbrated this rule, *Anderson* v. *Thompson*, 658 F.2d at 1213-1214, the placement chosen by the defendant school authorities was apparently found not to have caused irreparable damage. *Id.* at 1208, 1214 n.13. See same case, 495 F.Supp. 1256, 1269 (E.D. Wis. 1980). Likewise, there is nothing in the present record to indicate that Michael would have suffered irreparable damage from the placement at Pine Glen. As the Eighth Circuit said in *Miener*, 673 F.2d at 980: "But in the present case, nothing in the record suggests . . . exceptional circumstances like any of those in the cited cases." The First Circuit might, therefore, have been well advised to wait until it had a case in which there was good reason to believe that the child would have suffered irreparable damage if a change in placement had not been effected while the administrative process was pending before deciding whether the threat of such damage justified a judicially created exception to § 1415(e)(3). See *Permian Basin Area Rate Cases*, 390 U.S. 747, 755, *reh. den.* 392 U.S. 917 (1968).

If, however, the First Circuit was right to reach the issue, it was wrong in holding that the threat of irreparable injury to the child allowed the parents to change the placement, without permission from anyone, while administrative proceedings were pending. The error seems to stem from the court's misapprehension that even in cases where maintaining the status quo involves irreparable damage to the child, a court is without power to issue a preliminary injunction until administrative proceedings are completed (Pet. A. 130a: "until a district court properly has jurisdiction and can issue a preliminary injunction"). Where irreparable damage to Federal rights are threatened, a district court has power to issue an injunction to prevent it in advance of the completion of administrative proceedings. *Pacific Telephone & Telegraph Co.* v. *Kuykendall*, 265 U.S. 196, 201, 204-205 (1924); *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U.S. 177, 183-184 (1938); *Scripps-*

[42] See cases collected at 5 Shepard's *Causes of Action*, pp. 681-682, 685 (1984), in which other courts read such an exception into (e)(3).

Howard Radio Co., Inc. v. *Federal Communications Commission*, 316 U.S. 4, 9-10 (1942); *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U.S. 341, 349-350, (1951) (dictum). See *Leedom* v. *Kyne*, 358 U.S. 185, 190 (1958). The Supreme Judicial Court of Massachusetts has so construed the power of the Massachusetts trial court in EHA cases. *Stock* v. *Massachusetts Hospital School*, 392 Mass. 205, 213 (1984).

In those cases where the parents can demonstrate that the child will suffer irreparable damage if the status quo is maintained while administrative proceedings are pending, it is, for several reasons, far preferable that a court of competent jurisdiction be asked to grant preliminary relief than to have the parents resort to self-help.[43] First, a court can make due inquiry as to what effort the parents had made to use the available administrative process to avoid this irreparable damage. See *e.g.* 603 C.M.R. §§ 327.1, 327.2. Second, a court can often prod the administrative process to speedy resolution resulting in a final decision, which then of course can be the subject of a § 1415(e)(2) proceeding. In the course of such a proceeding, there appears to be no question about the power of the court to issue a preliminary injunction, *Doe* v. *Brookline School Committee*, 722 F.2d at 917. Third, the court will have the benefit of determining whether to issue or nor to issue an injunction at a time when no irrevocable or nearly irrevocable commitments have been made and no dire consequences for the parents or the child have stemmed from such commitments. Since EHA focuses exclusively on a free appropriate future education for the handicapped child, it is highly desirable that the question of irreparable damage be decided at a time when such commitments have not been made and such consequences have not come to pass. Fourth, even the presumably limited hearing that a judge would hold in determining whether or not to grant relief could result in some enlightenment to each side about the position of the other. For example, in this case, had the parents known in the summer of 1979 that Mr. McAleer's

[43] See generally, L. Jaffee, *Judicial Control of Administrative Action*, 193-194 (1965).

class was not a classroom for emotionally disturbed children (J.A. 208, 227; R.A. III, pp. 330-332) and had they been aware of Mr. McAleer's successes in dealing with children who had learning disabilities similar to Michael's (J.A. 208, 244), they very conceivably would not have placed Michael in the Carroll School. Moreover, they certainly would have become aware that placement in Mr. McAleer's class would not have caused Michael irreparable damage (Pet. A. 62a-63a). Once a child has actually commenced his studies at a private school, the position of the parents necessarily hardens, both because of financial considerations and because of the loss of face involved in returning the child to the public school. Finally, self-help is not the traditional remedy to prevent irreparable damage at the hands of government: resort to the courts is. See *United States* v. *Bailey*, 449 U.S. 394, 410-411 and n.8 (1980) citing *People* v. *Richards*, 269 Cal. App. 2d 768 (1969). There is no reason to depart from that salutary principle for purposes of EHA law.

The First Circuit read yet another exception into § 1415(e)(3), also based on *Anderson* v. *Thompson*, 658 F.2d at 1214. This was the "bad faith" exception, announcing that past serious procedural errors committed by local educational agencies in educating a handicapped child amounted to bad faith and thus justified a unilateral change in placement (Pet. A. 138a). We have already pointed out at p. 32, *supra*, that the court erred in equating procedural violations, even if they were serious, with bad faith. We suggest that past conduct of local educational agencies toward a handicapped child can never, by itself, be a ground for disregarding the provisions of § 1415(e)(3). EHA looks not to the past but the future. The only question properly before a hearing officer or a court in a EHA case is whether the IEP offers the child a free appropriate education. If it does, it should be implemented as written. So much would be true in any case, but it is especially true here for at least two reasons. One, which we have already discussed at length, is the relative triviality of the violations found. See pp. 30-31, *supra*. A second reason is that petitioners' placement at Pine Glen was plainly less restrictive then the parents' placement at the Carroll School. Congress has required that

handicapped children be, as far as possible, educated as they would be if they were not handicapped. 20 U.S.C. §§ 1412(5)(B) and 1414(a)(C)(iv). Federal regulations require that as far as possible handicapped children be mainstreamed, *i.e.*, educated with nonhandicapped children, 34 C.F.R. § 300.550(b)(1). Requiring local school authorities to pay for their past "transgressions" toward a handicapped child by providing him with more restrictive education is plainly contrary to the intention of EHA. Bad faith may well appear when, whatever the local educational agency has put on paper, it can be shown that the IEP is a mere sham. With a sense of the absurd one might imagine a case in which the local educational authorities propose what is, as written, a perfectly adequate IEP for a handicapped child but one which calls for him to be educated in a classroom that does not exist and never will exist. In that event, however, there would plainly be an issue of irreparable damage, making resort to the courts, and not self-help, the appropriate remedy. See pp. 50-51, *supra*.

Conclusion.

For the reasons given, the judgment should be reversed and the case remanded to the Court of Appeals with instructions to order the parents to reimburse petitioners as required by the judgment of the District Court.

Respectfully submitted,

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Addendum.

Relying on reference to EHA in Shepard's *United States Citations*, Statute Edition Supplements: 1974-1979, 1979-1983, and July, November and December 1984, petitioners have found 129 reported cases in which the placement of a handicapped child was in issue. In the following 76 cases the parents or guardians elected private placement for a handicapped child and demanded that local or State educational agencies ratify such private placement.

FIRST CIRCUIT

Town of Burlington v. *Department of Education for the Commonwealth of Massachusetts*, 736 F.2d 773 (1st Cir. 1984) *rev'g in part and remanding*, 561 F.Supp. 121 (D. Mass. 1983), *same case* 655 F.2d 428 (1st Cir. 1981)

Doe v. *Anrig*, 728 F.2d 30 (1st Cir. 1984) *aff'g*. 561 F.Supp. 121 (D. Mass. 1983), *same case* 692 F.2d 800 (1st Cir. 1982)

Abrahamson v. *Hershman*, 701 F.2d 223 (1st Cir. 1983)

Colin K. v. *Schmidt*, 715 F.2d 1 (1st Cir. 1983) *aff'g*. 536 F.Supp 1375 (D. R.I., 1982), *same case* 528 F. Supp. 355 (D. R.I. 1981)

Doe v. *Brookline School Committee*, 722 F.2d 910 (1st Cir. 1983)

Ezratty v. *Commonwealth of Puerto Rico*, 648 F.2d 770 (1st Cir. 1981)

Doe v. *Lawson*, 579 F.Supp. 1314 (D. Mass. 1984)

Blomstrom v. *Massachusetts Department of Education*, 532 F.Supp. 707 (D. Mass. 1982)

Turillo v. *Tyson*, 535 F.Supp. 577 (D. R.I. 1982)

Jaworski v. *Rhode Island Board of Regents for Education*, 530 F.Supp. 60 (D. R.I. 1981)

Norris v. *Massachusetts Department of Education*, 529 F.Supp. 759 (D. Mass. 1981)

SECOND CIRCUIT

Dubois v. *Connecticut State Board of Education*, 727 F.2d 44 (2nd Cir. 1984)
Zvi D. v. *Ambach*, 694 F.2d 904 (2nd Cir. 1982) *aff'g* 520 F. Supp. 196 (E.D. N.Y. 1981)
Riley v. *Ambach*, 668 F.2d 635 (2nd Cir. 1981), *rev'g* 508 F.Supp. 1222 (E.D. N.Y. 1980)

Smrcka v. *Ambach*, 555 F.Supp. 1227 (E.D. N.Y. 1983)
Flavin v. *Connecticut State Board of Education*, 553 F.Supp. 827 (D. Conn. 1982)
Gregg B. v. *Board of Education of the Lawrence School District*, 535 F.Supp. 1333 (E.D. N.Y. 1982)
Lombardi v. *Ambach*, 522 F.Supp. 867 (E.D. N.Y. 1981)
Papacoda v. *State of Connecticut*, 528 F.Supp. 68 (D. Conn. 1981) (dispute over extent of private education)
Stanger v. *Ambach*, 501 F.Supp. 1237 (S.D. N.Y. 1980)
Frankel v. *Commissioner of Education*, 480 F.Supp. 1156 (S.D. N.Y. 1979)

THIRD CIRCUIT

Grymes v. *Madden*, 672 F.2d 321 (3rd Cir. 1982)
Kruelle v. *New Castle County School District*, 642 F.2d 687 (3rd Cir. 1981), *aff'g* 489 F.Supp. 169 (D. Del. 1980)

Rollison v. *Biggs*, 567 F.Supp. 964 (D. Del. 1983)
Hark v. *The School District of Philadelphia*, 505 F.Supp. 727 (E.D. Penn. 1980)
Eberle v. *Board of Public Education of the School District of Pittsburgh, Pennsylvania*, 444 F.Supp. 41 (D. Penn. 1977), *aff'd* 582 F.2d 1274 (3rd Cir. 1978).

FOURTH CIRCUIT

Hessler v. *State Board of Education of Maryland*, 700 F.2d 134 (4th Cir. 1983)

Rowe v. *Henry County School Board*, 718 F.2d 115 (4th Cir. 1983)

Stemple v. *Board of Education of Prince George's County*, 464 F.Supp. 258 (D. Maryland 1979), *aff'd* 623 F.2d 893 (4th Cir. 1980)

Bales v. *Clarke*, 523 F.Supp. 1366 (E.D. Va. 1981)

Hines v. *Pitt County Board of Education*, 497 F.Supp. 403 (E.D. N.C., 1980)

Kruse v. *Campbell*, 431 F.Supp. 180 (E.D. Va. 1977)

FIFTH CIRCUIT

Scokin v. *State of Texas*, 723 F.2d 432 (5th Cir. 1984)

Marvin H. v. *Austin Independent School District*, 714 F.2d 1348 (5th Cir. 1983)

Stacey v. *Pasadena Independent School District*, 695 F.2d 949 (5th Cir. 1983)

David H. v. *Spring Branch Independent School District*, 569 F.Supp. 1324 (S.D. Tex. 1983)

Ruth Anne M. v. *Alvin Independent School District*, 532 F.Supp. 460 (S.D. Tex. 1982)

Gladys I. v. *Pearland Independent School District*, 520 F.Supp. 869 (S.D. Tex. 1981)

Howard S. v. *Friendswood Independent School District*, 454 F.Supp. 634 (S.D. Tex. 1978)

SIXTH CIRCUIT

Rettig v. *Kent City School District*, 539 F.Supp. 768 (N.D. Ohio, E.D., 1982) *aff'd in part, vacated in part* 720 F.2d 463 (6th Cir. 1983), *cert. denied* 104 S.Ct. 2379 (1984)

Sanders v. *Marquette Public Schools*, 561 F.Supp. 1361 (W.D. Mich. N.D. 1983)
Mitchell v. *Walter*, 538 F.Supp. 1111 (S.D. Ohio E.D. 1982)

SEVENTH CIRCUIT

Anderson v. *Thompson*, 495 F.Supp. 1256 (E.D. Wisconsin 1980), *aff'd* 658 F.2d 1205 (7th Cir. 1981)

Daniel B. v. *Wisconsin Department of Public Instruction*, 581 F.Supp. 585 (E.D. Wis. 1984)
John A. v. *Gill*, 565 F.Supp. 372 (N.D. Ill. E.D. 1983)
William S. v. *Gill*, 536 F.Supp. 505 (N.D. Ill. E.D. 1982) *reh'd* 572 F.Supp. 509 (N.D. Ill. E.D. 1983)
Mark R. v. *Board of Education, Bremen Community High School District*, 546 F.Supp. 1027 (N.D. Ill. E.D. 1982), *aff'd* 705 F.2d 462 (7th Cir., 1983)

EIGHTH CIRCUIT

Monahan v. *Nebraska*, 687 F.2d 1164 (8th Cir. 1982) *aff'g in part, vac'g in part* 530 F.Supp. 295 (D. Neb. 1981), *same case* 645 F.2d 592 (8th Cir. 1981) *aff'g in part, vac'g in part* 491 F.Supp. 1074 (D. Neb. 1980)

Cothern v. *Mallory*, 565 F.Supp. 701 (W.D. Mo. C.D. 1983)

NINTH CIRCUIT

Department of Education, State of Hawaii v. *Katherine D.*, 531 F.Supp. 517 (D. Hawaii 1982) *aff'd in part, rev'd in part* 727 F.2d 809 (9th Cir. 1983)
Mountain View-Los Altos Union High School District v. *Sharron B.H.*, 709 F.2d 28 (9th Cir. 1983)

Department of Education v. *Valenzuela*, 524 F.Supp. 261 (D. Hawaii, 1981)
Boxall v. *Sequoia Union High School District*, 464 F.Supp. 1104 (N.D. Cal. 1979)

TENTH CIRCUIT

Cain v. *Yukon Public Schools*, 556 F.Supp. 605 (W.D. Okl. 1983)

ELEVENTH CIRCUIT

Christopher N. v. *McDaniel*, 569 F.Supp. 291 (N.D. Ga. 1983)

DISTRICT OF COLUMBIA CIRCUIT

Parker v. *District of Columbia*, 588 F.Supp. 518 (D.C. D.C. 1983)
Jacobsen v. *District of Columbia Board of Education*, 564 F.Supp. 166 (D.C. D.C. 1983)
McKenzie v. *Jefferson*, 566 F.Supp. 404 (D.C. D.C. 1983)
Davis v. *District of Columbia Board of Education*, 522 F.Supp. 1102 (D.C. D.C. 1981) *reh. den.*, 530 F.Supp. 1215 (D.C. D.C. 1982)
Foster v. *District of Columbia Board of Education*, 523 F.Supp. 1142 (D.C. D.C. 1981)
Cox v. *Brown*, 498 F.Supp. 823 (D.C. D.C. 1980)

CALIFORNIA

Byrnes v. *Riles*, 157 Cal. App. 3d 1176 (4th Dist., 1984)
Newport-Mesa Unified School District of Orange County v. *Hubert*, 132 Cal. App. 3d 724 (4th Dist., 1982)
San Francisco Unified School District v. *State*, 131 Cal. App. 3d 54 (1st Dist., 1982)

DISTRICT OF COLUMBIA

Matter of J.A.G., D.C. App., 443 A.2d 13 (1982)

ILLINOIS

In re Walker, 107 Ill. App. 3d 1053 (1982)

IOWA

Buchwoltz v. *Iowa Department of Public Instruction*, 315 N.W. 2d 789 (Iowa, 1982)

MARYLAND

Breedon v. *Maryland State Department of Education*, 45 Md. App. 73 (1980)

MASSACHUSETTS

School Committee of Brookline v. *Bureau of Special Education Appeals*, 389 Mass. 705 (1983)

School Committee of Franklin v. *Commission of Education*, 17 Mass App. Ct. 683 (1984)

Isgur v. *School Committee of Newton*, 9 Mass. App. Ct. 290 (1980)

NEBRASKA

Adams Central School District v. *Deist*, 214 Neb. 357 (1983), *cert. den.* 104 S.C. 239 (1984)

NEW HAMPSHIRE

Petition of Darlene W., 469 A. 2d 1307 (N.H. 1983)

NEW YORK

Matter of J.F., 91 Misc. 2d 445 (1977)

NORTH CAROLINA

Harrell v. *Wilson County Schools*, 58 N.C.A. 260 (1982)

OREGON

Mahoney v. *Administrative School District*, Or. App., 601 826 (1979)

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No. 84-433

In the Supreme Court of the United States

OCTOBER TERM, 1984

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,

v.

DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO, AS HE IS NEXT FRIEND OF MICHAEL PANICO,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT ROBERT PANICO, AS NEXT FRIEND OF MICHAEL PANICO

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QUESTIONS PRESENTED

I. Does the relief provided by §1415(e)(2) of the Education for All Handicapped Children Act, 20 U.S.C §§1400 et seq., include reimbursement of tuition and related expenses incurred by parents to obtain the appropriate education for their handicapped child?

II. Where parents have rejected a proposed individualized education program, filed a timely request for administrative appeal, and then enrolled their child in a private school, does §1415(e)(3) of the Education for All Handicapped Children Act, 20 U.S.C §§1400 et seq., constitute a bar to tuition reimbursement?

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NO. 84-433

In the
Supreme Court of the United States
October Term, 1984

SCHOOL COMMITTEE OF THE TOWN
OF BURLINGTON, MASSACHUSETTS,
TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,
V.
DEPARTMENT OF EDUCATION FOR THE
COMMONWEALTH OF MASSACHUSETTS,
ROBERT PANICO, AS HE IS NEXT
FRIEND OF MICHAEL PANICO,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT ROBERT PANICO, AS NEXT FRIEND OF MICHAEL PANICO

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of federal law, the Education of the Handicapped Act, Pub. L. No. 94-142, 89 Stat. 773, 20 U.S.C. §§1400 et seq., as well as the relevant provisions of the law of the Commonwealth of Massachusetts, Chapter 766 of the Acts of 1972, Mass. Gen. Laws Ann. ch. 71B, §3, and certain of the implementing regulations, Mass. Admin. Code tit. 603, §28.327, 28.409 and 28.504(5), are set forth in the appendix to this brief.

INTRODUCTION

This case arises under the Education for all Handicapped Children Act, 20 U.S.C §§1400 et seq. (the "Act"). The central substantive purpose of the Act is to assure that all handicapped children be provided "a free appropriate public education which emphasizes special education . . . designed to meet their unique needs. . . " 20 U.S.C. §1400. As this Court observed in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 205 (1982), the Act's substantive goals are largely achieved through "the elaborate and highly specific procedural safeguards embodied in §1415."

On one level, this case concerns the question whether tuition reimbursement is available for a child

whose placement in a private school, although contrary to a local school's proposed educational plan, is nevertheless sustained as appropriate through the review mechanisms established under the Act. Yet, this case is about something more; the real question it poses is whether the parental right to challenge a proposed placement for a handicapped child, which this Court has recognized is central to the Act, has any practical meaning for handicapped children and their parents.

STATEMENT OF THE CASE

The long and complex administrative and judicial proceedings in this case concern Michael, the second of three children of Robert and Roseann Panico. Michael, who was born in September, 1970, lives with his family in Burlington, Massachusetts. He has

an older sister and a younger brother, both of whom attend the Burlington public schools.

The parties have always agreed that Michael is a child with above average to superior intelligence who suffers from a serious learning disability which causes him directional confusion and interferes with his reading, writing, spelling and ability to tell time. The parties have also agreed that Michael is "handicapped" within the meaning of the Act and, accordingly, is entitled to special education.[1/] The parties do not agree, however, as to two critical questions -- the nature of

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1/ The Act defines special education as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child...." 20 U.S.C. §1401(a)(16).

Michael's learning disability and the appropriate educational placement to meet his unique needs.

a. Michael's Education at the Memorial School from 1975 to 1979

Michael attended the Memorial School, the Burlington public school located near his home, from kindergarten through third grade. In first grade (1976-77), Michael had substantial difficulty learning to read. His teacher observed that Michael was having trouble paying attention to his work and was somewhat immature in comparison to his classmates. Mr. Panico repeatedly conferred with Michael's teacher, asking if any testing existed to determine if Michael had a learning problem. Mr. Panico was informed that no such testing existed.

On May 31, 1977, near the end of Michael's first grade year, the Memorial School wrote the Panicos to recommend that Michael repeat the first grade. The letter was self-styled an "educational plan", but was prepared without the consent, involvement or awareness of the Panicos.

Shortly before receiving the Memorial School's letter, Mr. Panico was informed by a teacher from a different public school system that she believed Michael had a learning disability and required a "core evaluation".[2/] In response to Mr.

2/ "Core evaluation" refers to the process used by Massachusetts law to generate an individualized education plan as required by the Federal Act. See 20 U.S.C. §§1401, 1412 and 1414 and Mass. Admin. Code tit. 603, §28.311.0 (1981).

Panico's request, the school initiated a core evaluation in June, 1977, but its result simply confirmed that the school wanted Michael to repeat first grade. In contravention of applicable regulations, the core evaluation failed either to make a determination that Michael did not have special educational needs, or to prepare an individualized education plan ("IEP"). (Appendix to Petition of the Town of Burlington for Certiorari, hereinafter "Pet." at 10a.)

During the summer of 1977, Michael was tutored in reading at the Panico's expense and made substantial progress. At the beginning of the 1977-78 school year, the Panicos accordingly requested that Michael not repeat first grade, and he was promoted to second grade. (Record

Appendix, hereinafter "R.A." IV at 326).

In second grade, Michael began to experience nightmares, migraine headaches and enormous fear of school. In late fall of 1977, Michael's pediatrician referred him to Dr. Ira Lott, a pediatric neurologist at the Massachusetts General Hospital. Dr. Lott concluded that Michael was in the superior range of intelligence, but showed clear evidence of a major learning disablity, commonly known as dyslexia. In spring 1978, Dr. Lott made his initial recommendation: a remedial program to be instituted by the Burlington school system to accompany Michael's other work at the Memorial School.

In 1978, the Memorial School prepared its first formal educational

plan for Michael covering the period from March 23, 1978 to March 23, 1979. (R.A. IV, 337-341).[3/] That plan described Michael as having the perceptual difficulties diagnosed by Dr. Lott, as well as being easily distractible. (R.A. IV, 338). The plan provided for two remedial components: first, counseling in two separate half-hour sessions each week, and second, one hour per day of individual reading instruction taught by Burlington school system reading specialist, Mrs. Kathryn Black. (Id., 340).

3/ This IEP provided for what Massachusetts characterizes under its special education regulations as a 502.2 prototype in which the student is away from the regular classroom less than 25% of the time. See Mass. Admin. Code tit. 603, §28.502.2.

Michael progressed in the spring of 1978. That summer, Mrs. Black tutored Michael on a volunteer basis so that, during the long vacation, he would not lose any of the progress he had made. At conferences held in the fall of 1978 and winter of 1979, the Panicos were assured that Michael continued to progress well.

b. The Genesis of the 1979 IEP

In April 1979, Michael began to experience a repeat of the migraine headaches, nightmares and fear of school. The Panicos consulted Mrs. Black. She told them that Michael was no longer making progress and also that, contrary to her own recommendations and without the Panicos' consent, Michael's educational program had been changed. His individual reading instruction had been reduced to one-half hour per day

(to accomodate the needs of another child). Mrs. Black suggested to the Panicos that the existing remedial program was insufficient and that Michael needed to be placed in a "total program" for the learning disabled.[4/]

During May and June, 1979, the parents had several meetings with school officials to discuss an appropriate educational plan and placement for Michael for the 1979-80 school year. At these meetings, the Panicos were told that Michael's learning problems stemmed from severe

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4/ Mrs. Black later testified at the hearing before the Massachusetts Bureau of Special Educational Appeals. She expressed the opinion that Michael's problems were not primarily emotional or behavioral and that Michael had a specific learning disability requiring a total program designed for dyslexic children like him. (R.A. III, 112, 124).

emotional or behavioral problems and that his current placement at the Memorial School was no longer proper for him. The Panicos were then told that Burlington recommended transfer of Michael to a class run by a Mr. McAleer at the Pine Glen School, a public school in Burlington several miles from the Panicos' home.

At this point, Mr. Panico requested a full core evaluation of Michael with testing by independent educational specialists. (Joint Appendix II hereinafter "J.A." at 323). Michael was again evaluated by Dr. Lott and his colleagues at the Massachusetts General Hospital. Dr. Lott informed Mr. Panico and later confirmed by letter that his test results showed that Michael's problems were not primarily emotional, that Michael was suffering from a discrete

neurological disfunction to which any "emotional" or "behavioral" problems were secondary.

On June 28, 1979, Burlington produced an IEP. The plan, which described Michael's problems as stemming from "negative attitudes and depression," proposed to transfer Michael to Mr. McAleer's class at the Pine Glen School. That class was more restrictive than his current class at Memorial and was a "substantially separate special class."[5/] The Panicos soon learned this class was generally referred to in the Burlington school system as the "primary adjustment class." (Pet. 7a). Of its six or seven students in

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5/ Designated as a 502.4 prototype under the Massachusetts regulations. See Mass. Admin. Code Ann. tit. 603 §28.502.4.

June, 1979, four or five were identified as having either behavioral or emotional problems. (Pet. 8a).

c. The Panicos Invoke the Administrative Review Mechanism and Prevail at the Hearing

The Panicos rejected the IEP on July 3, 1979, thereby invoking the administrative appeal mechanism prescribed by the Act. On July 10, 1979, Dr. Lott reiterated by letter that Michael's problems stemmed from a "severe learning disorder characterized by perceptual difficulties." He also recommended that Michael be placed in a highly specialized educational setting for children with Michael's learning disability such as the Carroll School, an approved private special education day school located in Lincoln, Massachusetts. (J.A. I, 26).

During the summer, a mediation session was held before the Bureau of Special Education Appeals ("BSEA"). However, when mediation proved unsuccessful, a hearing was scheduled before the BSEA. (J.A. I, 27, 34).[6/]

In early August, Mr. Panico also made contingency plans to enroll Michael in the Carroll School. On August 10, 1979, he made a deposit of $200 to secure a place for Michael (R.A. IV, 434). Only when it became clear in late August that mediation had failed and that the administrative hearing would not begin until late September did the Panicos actually enroll Michael at the Carroll School.

6/ A more detailed chronology of the events of July and August, 1979 is set forth at pp. 59-64, infra.

The administrative hearing before the BSEA took place over four days: September 26, October 30, 31 and November 1, 1979. Extensive testimony and more than 125 exhibits were introduced.

The hearing officer issued her decision on January 31, 1980. (Pet. 1a-27a). She found that Mr. McAleer's classroom at the Pine Glen School was not an appropriate placement for Michael; she also found that the Carroll School was the least restrictive appropriate placement for Michael. (Pet. 14a-15a). In particular, the hearing officer found that Mr. McAleer had limited experience teaching children with Michael's learning disabilities and that Michael needed a peer group "with similar need for a focus on reading objectives and with whom similar

teaching methods would be employed." (Pet. 14a). The reading skills of the students in Mr. McAleer's class were widely disparate:

> Just two children have learning disabilities.... Even if a group structure were possible, the skill variance among students might have the effect of increasing Michael's frustration.

(Pet. 15a). Further, Mr. McAleer's class would involve a day shortened by transportation schedules, rather than on account of Michael's needs. (Pet. 16a-17a).

The hearing officer also found "substantive and continuing procedural irregularity by Burlington." (Pet. 13a). Some of these findings pertained to prior years: for example, Burlington had failed to develop an educational plan within the meaning of state law when it proposed that Michael repeat first grade.

(Pet. 18a). Most significantly, by reducing the amount of time Michael spent with Mrs. Black during the 1978-79 school year, Burlington violated both Federal law and the Massachusetts regulation, §337.2, which requires parental consent before an IEP may be modified. Mass. Admin. Code Ann. tit. 603 §28.337.2. (Pet. 20a).

Many of the violations pertained to the manner in which the IEP in question was prepared, as well as aspects of the proposed placement in Mr. McAleer's class. For example, Burlington had exceeded the maximum age limit span in Mr. McAleer's classroom in violation of Massachusetts regulations. Mass. Admin. Code Ann. tit. 603 §28.502.4(c). (Pet. 17a). Burlington had also failed to give the Panicos

notice or to seek their consent in the spring of 1979 for evaluations used to "determine classroom placement and program" of Michael in violation of Massachusetts law, Mass. Gen. Laws Ann. ch. 71B, Mass. Admin. Code tit. 603, §§28.317.0-317.5, 28.505.5, and federal regulations, 34 C.F.R. §300.504. (Pet. 18a). The core evaluation meeting failed to include all persons responsible for assessments of Michael, in violation of Massachusetts regulations that seek to insure that "educational decisions are based on a view of a whole child." Mass. Admin. Code tit. 603, §§28.311.0, 312.0 (Pet. 18a-19a).[7/]

7/ Throughout the judicial proceedings, Burlington has persisted in demeaning the significance of the hearing officer's findings of "substantive

(Footnote continued on next page)

After concluding that Burlington's proposed IEP was not appropriate and that the Carroll School was the least restrictive appropriate placement, the hearing officer ordered Burlington to pay Michael's tuition for the 1979-1980 year, as well as the costs of transportation to the Carroll School. The hearing officer also ordered Burlington to reimburse the Panicos for costs they had incurred to

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(Footnote continued from previous page)

and continuing procedural irregularity by Burlington" -- most recently by referring to them as "facially trivial" in its brief to this Court (see, e.g., Brief for Petitioners, at 29). The Court of Appeals had a different view of Burlington's oft-repeated attitude towards these violations of Michael's procedural rights: "This court declines to rescue the plaintiff from its stance of stubborn indifference to and deprecation of its violations of [Michael's] procedural rights." (See Order of Court on Burlington's Motion for Rehearing and Rehearing en banc, Pet. 147a).

date for Michael's placement at the Carroll School.

d. The Litigation: February, 1980 to June, 1981

On February 26, 1980, Burlington filed a two count complaint in federal court against Mr. Panico and the Massachusetts Department of Education (the "State") to challenge the BSEA decision. The first count sought review under 20 U.S.C. §1415 (e)(2); the second asserted a state claim under the Massachusetts Administrative Procedure Act, Mass. Gen. Laws Ann. ch. 30A, §14.

On November 19, 1980, the court granted summary judgment in favor of the Panicos and the State upholding the BSEA decision (Pet. 28a-34a). This decision was rendered in accordance with the "substantial evidence" standard of the judicial review provisions of the Massachusetts

APA. On December 11, 1980, Burlington filed a notice of appeal from this ruling to the Court of Appeals for the First Circuit.

Despite the BSEA decision, Burlington failed to pay tuition or related expenses for 1979-1980, or for 1980-1981.[8/] Mr. Panico had borrowed to pay the Carroll School for 1979-1980. As of December 1980, no one had paid tuition for the 1980-1981 year. Accordingly, the State and the Panicos filed motions for preliminary relief, asking the court to order Burlington to reimburse the parents for the 1979-1980 tuition and to pay

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8/ Under state law, a complaint for judicial review does not operate as a stay of the BSEA decision which is to be implemented forthwith. See Mass. Admin. Code tit. 603, §28.410.0. On May 8, 1980, Burlington moved for a stay of the BSEA decision. This motion was denied by the district court on July 24, 1980. (J.A. I, 1).

the current year's tuition. At a hearing on February 9, 1981, Burlington finally agreed to pay Michael's tuition and related costs for the 1980-1981 school year. However, Burlington refused to reimburse the parents for the 1979-1980 year. On February 12, 1981, the court ordered Burlington to comply with the order of the BSEA and to reimburse the Panicos for tuition they had paid during the 1979-80 school year. (J.A. I, 187-88). Burlington appealed from this order as well as from the previous denial of its motion for a stay.

On June 18, 1981, the Court of Appeals issued its first opinion in this case. (Pet. 36a-47a). The court affirmed the denial of Burlington's motion for a stay of the BSEA order. However, the court vacated the

district court's order granting summary judgment on the ground that the Act, §1415(e)(2), provided a preemptive standard of review.[9/] It then remanded the case to the district court for a trial under the federal standard. The court also vacated the district court order that Burlington reimburse the Panicos for 1979-1980 tuition.

e. The Case on Remand - June, 1981 to May, 1983

In the fall of 1981, Burlington moved for summary judgment on several grounds: 1) that 20 U.S.C. §1415(e)(3) barred the parents from receiving any tuition reimbursement

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9/ The federal provision directs that the reviewing court "'shall hear additional evidence at the request of a party', while the state provision normally confines its review to the record developed by the agency." (Pet. 42a-43a).

because they had changed their minor child's placement prior to the resolution of review proceedings; 2) that the court's jurisdiction was limited to the 1979-1980 year; and 3) that Burlington was also not liable for years after 1979-1980 because the Panicos had allegedly failed to make Michael available for an evaluation after that time. (J.A. I, 189).

On March 18, 1982, the district court entered a detailed pre-trial order governing the issues raised by Burlington's motion for summary judgment as well as several other questions pertaining to the conduct of the trial which had been raised by the parties in pre-trial memoranda. (Pet. 48a-56a). In its order, the district court ruled that it had jurisdiction over 1979-1980 and subsequent years, that the court would accept

"additional relevant evidence" to the BSEA finding to determine the appropriate placement, and that the burden of proof would be on Burlington with respect to 1979-1980 and on the Panicos with respect to subsequent years. (Pet. 49a-50a). Further, the district court denied Burlington's summary judgment motion, finding that §1415(e)(3) was not intended to bar the parents' right to obtain review of a child's placement, but rather meant that a parent who moved a child into a private school would be at risk for tuition paid during the pendency of the proceedings should the parent ultimately lose on the issue of the appropriate placement. Finally, the court declined to receive evidence regarding the allocation of fault between the parties for the failure to

prepare IEPs for the 1980-81 and 1981-82 school years.[10/]

The trial was held on four days in May 1982. Burlington introduced testimony from the same six witnesses who had testified at the administrative hearing, in addition to testimony from Michael's first grade teacher and an

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10/ Burlington's Brief at 36 again tries to resurrect the notion that the Panicos prevented Burlington from preparing an IEP for Michael in these years. However, the correspondence between the Panicos' then counsel and Burlington regarding evaluations for 1980-1981 and 1981-1982 makes clear that the Panicos' had sought an IEP and were, in fact, willing to make Michael available for later years, if certain guidelines were observed. (J.A. I, 181-85). Because of the district court's pre-trial ruling, no evidence was introduced and no factual finding made as to conduct regarding the preparation of IEPs for later years. (see also the Court of Appeals discussion of why Burlington's constant assertions on this point are without merit. Pet. 123a).

additional expert. Mr. Panico and the State relied largely on the BSEA decision but introduced testimony from Mr. Panico, from three teachers and an administrator at the Carroll School and from a doctor who had treated Michael since 1981. In an August 1982 decision, the district court found Burlington had shown, "by a preponderance of the evidence," that its proposed placement in Mr. McAleer's class was appropriate for the year 1979-1980 and that the parents had failed to meet their burden to show "that for subsequent years such placement would have been inappropriate." (Pet. 66a).

Burlington then submitted a proposed form of judgment and bill of costs seeking an order requiring Mr. Panico to repay the tuition and transportation costs it had paid for

1980-81 and part of 1981-82 (in the amount of $12,844.66) and costs, including its expert witness fee (in the amount of $8,631.90). (R.A. I at 93-94). On September 30, 1982, the district court entered an order approving certain items in the bill of costs, but disallowing others, including the expert witness fee.

On March 7, 1983, the court ruled that Mr. Panico was obliged to repay Burlington any sums it had advanced for Michael's tuition and related transportation, less any marginal costs Burlington would normally have incurred to educate Michael and less any funds received from the State for Michael's education. On May 9, 1983, the district court entered judgment ordering the Panicos to repay Burlington $8,449.00 and ruling that Burlington was not responsible for

the expenses that the Panicos had incurred for the 1979-80 school year. (J.A. II, 407).

f. The Court of Appeals' Reversal

The Panicos and the State appealed from the district court's decision setting aside the BSEA's ruling on the appropriate placement; they also sought reversal of the retroactive reimbursement awarded to Burlington. The Court of Appeals issued its second opinion on May 29, 1984. (Pet. 87a-143a). The Court vacated the district court's finding as to the appropriate placement for Michael as inconsistent with the deference due the findings of the BSEA hearing officer under this Court's opinion in Rowley, supra, and remanded for a new trial. The Court of Appeals ruled, inter alia, that the district court had incorrectly applied the "additional evidence" standard of

§1415(e)(2), had misallocated the burden of proof, had failed to consider the significance of Burlington's procedural violations, and had failed to make appropriate findings with respect to the nature of Michael's learning disabilities. The court also issued guidelines to the district court on the issue of reimbursement.

The court concluded that reimbursement of tuition was available as a form of relief under §1415(e)(2) of the Act and that the "then current placement language" of §1415(e)(3) did not present a bar to the parents' right to obtain reimbursement. (Pet. 127a-28a). It further ruled that the award of tuition was not automatic but was "to be a matter of equitable relief, committed to the sound

discretion of the district court." (Pet. 137a).

On September 18, 1984, Burlington filed a petition for writ of certiorari seeking review of all aspects of the Court of Appeal's decision. This Court granted certiorari limited to questions I and V, which address the power of the district court to grant tuition reimbursement.

SUMMARY OF ARGUMENT

The decision of the First Circuit Court of Appeals should be affirmed in all respects. The "appropriate relief" provided by §1415(e)(2) encompasses tuition reimbursement. This is the only reading that is consistent with the language of the section and with the Act's legislative history and goals. It is also the only reading that can give practical

meaning to the extensive procedural protections afforded to parents and children under the Act.

Section 1415(e)(3), which safeguards continuity in the child's educational placements, does not address the allocation of financial responsibility and does not constitute a bar to a parent's obtaining tuition reimbursement under the Act. It was intended to protect the rights of handicapped children and their parents during placement disputes and to prevent a local educational agency from unilaterally altering a handicapped child's educational program.

ARGUMENT

I. UNDER THE ACT, A DISTRICT COURT HAS THE DISCRETION TO AWARD TUITION REIMBURSEMENT.

Section 1415(e)(2) provides that a court reviewing a state administrative

decision has the power under the Act to "grant such relief as the court determines is appropriate." §1415(e)(2). Under this broad grant of authority, the district court has the discretion to award the Panicos the tuition and related costs of placing Michael in the Carroll School. While Burlington would impose substantial limitations on the court's power to award relief, this view is without support in the language of §1415(e)(2) and is contrary to the overall purposes of the Act, its legislative history, and prevailing case law.

A. The Act's Procedural Mechanisms Are Instrumental To The Accomplishment Of The Act's Substantive Goals.

From the vantage point of handicapped children and their parents, the Act's central purpose is

"to assure that all handicapped children" be provided "a free appropriate public education which emphasizes special education . . . designed to meet their unique needs" and "to assure that the rights of handicapped children and their parents are protected." 20 U.S.C. §1400.

Instrumental to the provision of the "free appropriate public education" contemplated by the Act is the development of an "individualized education program" ("IEP"). The Act requires the local educational agency to provide assurances that it will annually "establish, or revise . . . an individualized education program for each handicapped child." 20 U.S.C. §1414(a)(5). As this Court has noted, the IEP is the "means" by which the "'free appropriate public education' required by the Act is

tailored to the unique needs of the handicapped child." Rowley, supra, 458 U.S. at 182.

The Act also requires each participating state and local education agency to establish elaborate review procedures "to assure that handicapped children and their parents . . . are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C §1415(a). Central among these safeguards is the "impartial due process hearing" to challenge what they view as an erroneous decision by the school authorities regarding the evaluation or placement of their child. 20 U.S.C. §1415(b)(2).

This Court has repeatedly stressed the central role of the Act's review

procedures. As this Court observed in Rowley,

> Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard.

Id. at 205-206.

Again, in Smith v. Robinson, ___ U.S. ___, 104 S. Ct. 3457, 3469 (1984), this Court reemphasized the connection between the procedural and substantive goals of the Act:

> The procedures not only ensure that hearings conducted by the State are fair and adequate. They also effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards and a right to judicial review.

B. Tuition Reimbursement Is The Only Relief Which Would Make The Review Afforded By The Act Meaningful.

The language of §1415(e)(2) is a broad grant of authority which imposes no express limitation on the power of the reviewing court to award relief: "the court shall grant such relief as the court determines is appropriate." Further, the Senate Conference Report supports a broad construction; it describes the power of the district court to award "all appropriate relief." Sen. Conf. Rep. No. 45, 94th Cong., 1st Sess. 50, reprinted in 1975 U.S. Code Cong. & Ad. News 1503 (1975)(emphasis added). Any limitation on the power to grant appropriate relief "should not be lightly inferred." Matthews v. Ambach, 552 F. Supp. 1273, 1279 (W.D.N.Y. 1982)(declining to grant

summary judgment on the ground no tuition reimbursement is available under the Act).

The legislative history of the Act shows that Congress believed the Act gives the hearing officer and reviewing court the power to order tuition reimbursement. Discussing the forerunner of §1415, the Senate Committee report states:

> If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under section 614 (5) applies.

Senate Report No. 168, 94th Cong. 1st Sess. 32, reprinted in 1975 U.S. Code Cong. & Ad. News 1456 (emphasis added).[11/]

Further, unless relief provided under §1415(e)(2) includes the power to order tuition reimbursement, the important parental right to reject and seek review of an IEP will be meaningless. A hollow declaration, six years after the parents reject an IEP, cannot be the only relief that Congress intended. Similarly, limiting the court to a prospective determination makes little sense; the child's needs may change in future years, leaving the challenged IEP without meaning. Why create the

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11/ Section 614 (5) created procedural safeguards which were nearly identical to the §1415 due process procedures ultimately enacted.

elaborate procedural safeguards and mechanisms to ensure parental participation, if the reviewing court ultimately does not have the authority to award the only relief which can make review meaningful?

C. Tuition Reimbursement Serves The Statutory Goal Of Providing A Free Appropriate Public Education.

Tuition reimbursement for an appropriate placement places the burden of providing the "free appropriate public education" where it belongs under the Act -- on the school district.

> It is difficult to imagine a better "fit" between such a statutory purpose and an award of damages limited to the amount of expenses incurred in providing an appropriate education for a handicapped student in the event that a school district has failed to satisfy its obligations to provide such an education.

Matthews v. Ambach, supra, at 1279. In Doe v. Brookline School Committee, 722 F.2d 910 (1st Cir. 1983), the court noted that if a parent pays a private school later found to be the appropriate placement,

> the school system has effectively transferred part of its contractual public obligation to a private party, in contravention of the statute's express primary directive . . . [to provide a] free appropriate public education.

Id. at 916.

Reimbursement provides the proper incentive for the parent to seek an appropriate placement. A court's power to order reimbursement as appropriate relief properly allocates the financial risk by "requir[ing] each party to bear the cost of its own errors of judgment in determining what a 'free appropriate education' for a child requires in the pertinent

circumstances." Doe v. Brookline, supra, at 920. The potential for reimbursement for a placement later found to be justified would encourage parents, when "convinced that their child is not receiving an appropriate education," to be "assiduous in protecting their child's rights," while the "potential of having to repay the school system for a change to a private school would militate against impulsive or unfounded actions; a balance is struck." Id. at 920-21.

D. The Prevailing View Is That Reimbursement Falls Under The Relief Provided By §1415(e)(2).

The prevailing view among the federal courts is that the relief provided in §1415(e)(2) does encompass reimbursement to parents for

tuition in at least some

circumstances.[12/]

12/ See Department of Education, State of Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1983); Doe v. Brookline, supra (1st Cir. 1983); Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981); Gary A. v. New Trier High School District No. 203, 1983-84 EHLR (BNA) 555:376 (N.D. Ill. 1984); Hall v. Vance 1983-84 EHLR (BNA) 555:437 (E.D.N.C. 1983); Christopher N. v. McDaniel, 569 F. Supp. 291 (N.D. Ga. 1983); Matthews v. Ambach, 552 F. Supp. 1273 (W.D.N.Y. 1982); William S. v. Gill, 536 F. Supp. 505 (N.D. Ill. 1982); Gregg B. v. Board of Education of the Lawrence School District, 535 F. Supp. 1333 (E.D.N.Y. 1982); Carter v. Independent School District No. 6 of Sequoyah County, 550 F. Supp. 172 (W.D. Okla. 1981); Tatro v. Irving Independent School District, 516 F. Supp. 968 (N.D. Tex. 1981), aff'd 703 F.2d 823 (5th Cir. 1983); ___ U.S. ___, 104 S. Ct. 3371 (1984); Miener v. State of Missouri, 498 F. Supp. 949 (E.D. Mo. 1980), modified, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909, (1982); North v. District of Columbia Bd of Ed., 471 F. Supp. 136 (D.D.C. 1979).

In the few reported cases where a school district failed to provide an appropriate education for the child, courts have uniformly awarded tuition reimbursement. See Tatro v. Irving Independent School District, 516 F. Supp. 968 (N.D. Tex. 1981), aff'd, 703 F.2d 823 (1983) and ___ U.S. ___, 104 S. Ct. 3371 (1984); Katherine D., supra; and Hall v. Vance, supra.

In Tatro, this Court affirmed an award of reimbursement for the cost of obtaining medical services which the Court found to be that portion of the "free appropriate public education" referred to as "related services" under 20 U.S.C. §1401(a)(17).[13/] The district court found the school

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13/ "Free appropriate public education" is defined as "special education and related services." 20 U.S.C. §1401(a)(18).

district's IEP inappropriate because it failed to provide plaintiff with the "free, appropriate public education required by the Act." The court ordered the school district to prepare an IEP for the current year which would provide the necessary services, and to reimburse the Tatros for the expenses of obtaining elsewhere the education and services required by the Act for prior years.

> The school district, by reimbursing the parents, indirectly bears the cost it would have borne directly had it furnished the services it was obligated to provide. That is, the money "damages" reflect no more than a judicially compelled provision of the statutorily ordered free appropriate education. This relief seems to fall within the congressionally mandated duty to "grant such relief as the court determines is appropriate."

Id. at 978.

The Court of Appeals for the Fifth Circuit and this Court each affirmed the district court's decision, including its award of reimbursement to the parents for the money they had previously been obligated to spend to secure the required "related services". If the district court has the authority to award reimbursement for related services, then it must also have authority to award reimbursement for the special educational program to which those services "relate". While this Court's decision in Tatro may not have expressly decided that the district court has the discretion to award a parent tuition reimbursement under the

Act, the holding is implicit in the Court's reasoning.[14/]

Those courts which have interpreted §1415(e)(2) to limit tuition reimbursement to narrow circumstances have not been presented with facts akin to those now before the Court. A close reading of those cases demonstrates that their narrow construction of §1415(e)(2) arises in a context where the school district has offered an appropriate placement.

Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981), is the most prominent example. In Anderson, both the hearing officer and the district court found that while the Wisconsin

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14/ See also Hall v. Vance County Board of Education, 1983-84 EHLR (BNA) 555:437 (D.N.C. 1983)(tuition reimbursement awarded on facts strikingly similar to those before this Court).

school system may have incorrectly diagnosed the plaintiff, the parents had failed to show that the appropriate diagnosis "mandated any differences in programming." Id. at 1208.

The Court of Appeals for the Seventh Circuit affirmed the district court's refusal to order tuition reimbursement. Thus, the issue of reimbursement was presented to the court in a setting where the school district had, in fact, provided what the hearing officer and the reviewing courts had concluded was an appropriate placement.

In affirming the denial of reimbursement on the facts before it, Anderson reasoned that tuition reimbursement would, nevertheless, still be available in certain narrow circumstances, such as where the

procedural irregularities of the school district suggest bad faith, or where exigencies of the child's health require immediate withdrawal. Neither of those circumstances were, however, then before the court.[15/]

It is one thing to say that tuition reimbursement may be denied where a school district has provided an adequate program. See, e.g., Marvin H. v. Independent School District, 714 F.2d 1348 (5th Cir. 1983); Scokin v. State of Texas, 723 F.2d 432 (5th Cir. 1984). It is quite

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15/ Significantly, Judge Swygert, the author of Anderson, sat by designation on the First Circuit Court of Appeals panel which decided the instant case. Doubtless if Judge Swygert felt that the overall analysis of the Court of Appeals in this case conflicted with his opinion in Anderson, he would not have joined in the court's decision.

another to say that tuition reimbursement cannot be an appropriate form of relief under the Act.

It is the latter, seemingly self-evident proposition that Burlington urges this Court to reject. Yet, the language of §1415(e)(2) as well as the overall framework, purpose, and legislative history of the Act, make it clear that Congress intended a district court to have the discretion, in appropriate circumstances, to award tuition reimbursement.

E. The Court Of Appeals' Guidelines For Determining Whether Tuition Reimbursement Should Be Awarded In Particular Cases Are Fully Consistent With The Act.

In a complex factual and procedural setting, the Court of Appeals made it clear that, while tuition reimbursement was available to the prevailing party under

§1415(e)(2), such reimbursement was not automatic. Rather, the district court is to consider the ramifications of a series of equitable factors before it decides upon the "appropriate relief" in a particular case.

Despite Burlington's repeated assertions to the contrary, the considerations discussed by the Court of Appeals do not pertain to an award of "damages" in any normal sense of that word. For example, the parents do not seek, nor has the Court of Appeals ever authorized, compensatory damages under the type of "educational malpractice" theory raised and rejected in Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979).

Similarly, there are no claims here for "punitive" damages, and the Court of Appeals specifically rejected

the parents' arguments that they should automatically receive tuition through final judgment in reliance on the BSEA decision, reasoning that such relief "smacks more of a penalty." (Pet. 136a). Rather, the guidelines govern restitution for tuition payments and related costs for a handicapped child who is admittedly entitled to services under the Act.

On remand, the district court may affirm the BSEA decision in all respects and find Burlington's proposed IEP was inappropriate and that the Carroll School was the appropriate placement for Michael. The court may then award tuition reimbursement to the parents "unless the court finds that other factual circumstances not now apparent warrant a different result." (Pet. 124a). Thus, if Burlington proves to the

district court that the parents failed to cooperate in the preparation of the IEP, or to attend mediation sessions, or engaged in other conduct unreasonable in the circumstances, then the district court could deny tuition reimbursement even if the parents prevail on the appropriate placement issues.

Similarly, if the district court reverses the BSEA decision and upholds Burlington's 1979-80 IEP, then factors such as those described by the Court of Appeals should determine whether an award of reimbursement to Burlington is "appropriate relief". These factors will include: 1) the parents' reasonable reliance on the BSEA decision and subsequent court decisions and 2) the "substantive and continuing procedural" violations which the hearing officer found

Burlington had committed regarding Michael.

The Court of Appeals has made the award of tuition reimbursement depend not merely on the outcome of the district court's ultimate decision on the appropriate placement, but also on an even-handed application of a set of equitable principles to the parties' conduct during this six-year saga. Such an approach is sensible, fair and would appear to be precisely what Congress intended when it provided the district court with the flexible authority of §1415(e)(2) to "grant such relief as the court determines is appropriate."[16/]

16/ A statutory remedy need not entitle prevailing parties to the same relief where the statute's purposes would not be served

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II. THE PANICOS' ENROLLMENT OF MICHAEL IN THE CARROLL SCHOOL, PENDING ADMINISTRATIVE AND JUDICIAL REVIEW, DOES NOT BAR THEM FROM SEEKING REIMBURSEMENT UNDER §1415(e)(3)

As set forth above, §1415 of the Act provides certain "procedural safeguards". Included among these safeguards is §1415(e)(3), which provides:

> During the pendency of any [judicial or administrative review] proceedings . . . unless the State or local educational agency and the parents . . . otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public

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thereby. See Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421 (1978)(attorney's fees routinely awarded to "prevailing party" in civil rights action; but, award to successful defendant permitted only where action brought found to be unreasonable, vexatious, frivolous or meritless).

> school, shall with the consent of the parents ... be placed in the public school program until all such proceedings have been completed.

Burlington argues that where parents "unilaterally" change the placement of a child from a public to a private school they are in violation of §1415(e)(3). Burlington further argues that if parents unilaterally change the placement of their child during the pendency of review, then parents are barred from tuition reimbursement under §1415(e)(2) regardless of whether their placement is ultimately upheld. The Court of Appeals was correct in concluding that neither of these logical leaps is justified either by the language or derivation of §1415(e)(3) specifically, or by the overall purposes of the Act.

The factual context in which Burlington invokes §1415(e)(3) as a bar to reimbursement makes clear the dilemma parents like the Panicos face when they exercise one of the key procedural rights Congress gave them under the Act -- i.e., the right to reject an IEP and seek review of the appropriateness of the rejected IEP.

On July 3, 1979, Mr. Panico rejected the IEP. (R.A., IV, 519). The rejected IEP was forwarded by Burlington to the BSEA on July 6, 1979. (R.A. IV, 510). Having received no word from the BSEA as to what would happen next, he telephoned a Ms. Betsy Burch of BSEA on July 17, 1979 for instructions as to how he should proceed. He followed this up with a letter to the BSEA on July 17th (J.A. I, 28), again requesting a hearing and confirming his

understanding that the hearing would be held within 20 days.[17/]

On July 30, the BSEA notified the Panicos that their appeal would be scheduled for August 8th (J.A. I, 30); Mr. Panico then retained counsel, the hearing was postponed, and a mediation session was, in fact, scheduled for August 17th. In the hopeful and cooperative spirit with which the Panicos approached the mediation,

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17/ Mr. Panico has testified in several places in the administrative record (e.g., R.A. IV, 475; R.A. III, 250-251) that he was informed by Ms. Burch that Burlington initially had refused to participate in mediation. (See also Testimony of Mr. Michael of Burlington, R.A. III, 528-32). As explained supra, at 27, the district court, in its pre-trial order, had ruled that §1415(e)(3) was not a bar to the parents' claim for tuition reimbursement. Consequently, no findings were made by the district court regarding this point or other conduct of the parties during this period.

their then counsel forwarded to the Superintendent of the Burlington schools medical reports from Massachusetts General Hospital and advised that Michael's remedial reading teacher, Mrs. Black, was also willing to attend the mediation session. (J.A. I, 32-33). However, the session proved fruitless, and the Panicos again requested a hearing which was scheduled by the BSEA for September 26, 1979. (J.A. I, 35).

In rejecting the proposed IEP, the Panicos scrupulously followed the procedures for review provided by state and federal law and took every step they could to expedite the proceedings. However, due to circumstances beyond the Panicos' control, the hearing was postponed until after the commencement of the next school year. Thus, the parents

were faced with a difficult choice during the pendency of the proceedings they had invoked: either place their child in the IEP which they had rejected on the advice of Dr. Lott and Mrs. Black, or place Michael in the school recommended by these specialists, i.e., the Carroll School. The Panicos did what all rational parents would do in this setting: they made contingency plans to enroll Michael in the Carroll School.[18/] That is, on August 10th,

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18/ In the summer of 1979, no one familar with the Massachusetts' special education laws and regulations would have dreamed that, by placing a child in private school after rejecting an IEP and requesting an administrative hearing, the parents would be forever barred from obtaining tuition reimbursement if the school's educational plan was eventually held not to be appropriate.

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they made a deposit of $200 to secure a place for Michael in case mediation failed. (R.A. IV, 434). Then, on August 22nd, when mediation had proved unsuccessful, the Carroll School prepared an educational plan for Michael which was intended to be used both for Michael's education and to be submitted to the hearing officer. (R.A. IV, 436-44). Finally, when it became clear that the hearing would

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Rather, the Supreme Judicial Court in Amherst-Pelham Regional School Committee v. Department of Education, 376 Mass. 480 (1978), had unambiguously concluded the opposite. See infra at 86-89. That everyone understood this principle in the summer of 1979 is evidenced by Burlington's failure to say anything to the contrary during the administrative hearing or, in fact, until well into the judicial proceedings. See, e.g., Burlington's brief submitted to the hearing officer, R.A. IV, 286-295.

not begin until late September, Mr. Panico paid the first semester's tuition to Carroll. His payment was made on September 5th, and Michael began school two days later. (R.A. IV, 434).

A. Section 1415(e)(3) Does Not Relate To Funding.

As the Court of Appeals has made clear, the "then current placement" language of §1415(e)(3) does not relate to the question of ultimate financial responsibility for the payment of special educational services. Instead, this section was intended merely to insure that, during placement disputes, a local educational agency could not unilaterally change a child's

educational placement.[19] See Doe v. Brookline, supra, 722 F.2d at 918 (§1415(e)(3) establishes a "strong preference, but not a statutory duty, for maintenance of the status quo"). Accord, Anderson v. Thompson, supra.

Burlington's construction of §1415(e)(3) was specifically rejected in the case of Frankel v. Commissioner of Education, 480 F. Supp. 1156 (S.D.N.Y. 1979) as clearly inconsistent with the procedural safeguards provided by the Act. In

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19/ That §1415(e)(3) was intended for the protection of handicapped children and their parents and not towns may be inferred from the section's last clause which deals with a situation where a parent is applying for the child's initial admission to school. This clause makes it clear that the town cannot exclude the child from the public school (without parental consent) until any administrative hearing or judicial review is complete.

rejecting the defendants' motion to dismiss, the Court reasoned as follows:

> Defendants appear to be claiming that, during the pendency of the appeal, plaintiffs had no choice other than to accept the decision of the Commission or provide a suitable educational alternative at their own expense. In effect, this interpretation renders the Commissioner's decision final and unreviewable for the 1976-77 school year and deprives the defendants of the rights protected by the Education for All Handicapped Children Act and New York Education Law. . . .

Id. at 1160 (emphasis added).

Stemple v. Board of Education of Prince George County, 623 F.2d 893 (4th Cir. 1980), on which Burlington relies, arises in a fact situation which properly should be distinguished from the facts before this Court. First, in Stemple, the district court had dismissed the suit on the ground that the plaintiff could not obtain

judicial relief under the Act because the challenged administrative proceedings concerned reimbursement for a period prior to the effective date of the Act. Second, state agency review had found that the school district was capable of providing an appropriate education for plaintiff in the public schools. Finally, the parents had withdrawn their child from the public school in Stemple without invoking any of the procedural protections of the Act. It was only after withdrawal that they requested the school district to fund the private school.

On appeal, the Fourth Circuit determined that it need not consider whether the Act should apply to reimbursement for tuition paid before the Act became effective, since the language of §1415(e)(3), it reasoned,

precluded reimbursement. Id. at 896. Thus, the issue of whether, once parents had properly invoked the review procedures, they are bound by a status quo provision was not considered by the Fourth Circuit.

Other cases to apply the Stemple rule have similarly involved facts which suggest that parents placed their child in a private school notwithstanding the fact that the public school ultimately is held to have offered an appropriate placement. See, e.g., Flavin v. Connecticut State Board of Education, 553 F. Supp. 827 (D. Conn. 1982)(state hearing officer affirmed the IEP as did Board of Education); Scokin v. State of Texas, 723 F.2d 432 (5th Cir.

1984)(child found to benefit from state placement).[20]

B. The Legislative History Of 1415(e)(3) Makes It Clear That Congress Did Not Intend This Section To Operate As A Bar To A Parent Seeking Reimbursement.

Section 1415(e)(3) was added at the conference stage. The Senate floor debates make clear Congressional concern that extended due process procedures would cause a detrimental delay in the child's change of placement. Senator Stafford, a member

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20/ Mountain View-Los Altos Union High School District, 709 F.2d 28 (9th Cir. 1983), cited frequently by petitioner, must also be understood in context. Contrary to petitioner's representations that the case confirms an alleged bar to reimbursement on account of the "stay-put" provision of §1415(e)(3)(Petitioner's Brief at 42), the Ninth Circuit simply refused to award what it characterized as damages, relying on the reasoning articulated in Anderson v. Thompson, supra. Id. at 30.

of the Committee on Labor and Public Welfare, the sponsor of the Act, noted "the placement, or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus, the conference adopted a flexible approach to try to meet the needs of both the child and the State." S.20429. Thus, Congress was concerned, in passing the Act, that a child's individualized educational program not be delayed by the due process review afforded by the Act.[21/]

21/ Petitioner has correctly pointed out that learning disabilities are difficult to remedy. (Brief at 39). Petitioner's argument that it makes no difference what educational placement is offered a child with learning difficulties, or when such a placement is offered, is contrary to the basic

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The evolution of the Act also suggests the genesis of §1415(e)(3). As this court observed in Rowley, two lawsuits, Mills v. Board of Education

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> propositions on which the Act was founded. The legislative history shows Congress was aware of the need for early intervention for the learning disabled. See, e.g., Testimony of New Jersey Inter-Agency Committee for the Handicapped, Education For All Handicapped Children: Hearings on S.6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 93d Cong., 1st Sess. 263 (1973)("widely accepted that the earlier we identify handicaps and intervene with appropriate educational therapy, the greater the chances are for rehabilitation"); Statement of Dr. Charles Barnett, Commissioner, South Carolina Department of Mental Retardation, id. at 666 ("definite need for very early intervention, at the earliest possible time"). See also Baren, M., Liebl, R., Smith, L., Overcoming Learning Disabilties: A Team Approach 4 (1978); Wagner, R., Dyslexia and Your Child: A

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of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972) and Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972)("PARC"), provided a principal impetus for the passage of the Act. 458 U.S. at 192. These suits were brought by parents of handicapped children to challenge the

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Guide for Teachers and Parents 1,153 (rev. ed. 1979); Smith, S.L., No Easy Answers: The Learning Disabled Child at Home and at School 160 (1979).

Furthermore, Petitioner's view that "there is nothing in the present record to indicate that Michael would have suffered irreparable damage," Brief at 49, suggests a view of the process of educating handicapped children, and dyslexic children in particular, totally at odds with the early intervention principles which underlie the Act.

unequal access of handicapped children to public educations. See S. Rep. No. 168, 94th Cong. 1st Sess. 6, reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1430; H. Rep. No. 332, 94th Cong. 1st Sess. 3 (1975). Both Mills and PARC focussed on efforts by parents to prevent the exclusion or expulsion of their children from the public schools, as well "the widespread practice of 'dumping' -- placing handicapped children into inadequate special classes in order to rid teachers and school officials of the problem of dealing with the children's special needs." Note, "Enforcing the Right to an 'Appropriate' Education: The Education for All Handicapped Children Act of 1975," 92 Harv. L. Rev. 1103, 1121 (1979).

The consent decrees in the Mills and PARC both contain provisions similar to §1415(e)(3). See Foster v. District of Columbia Board of Ed., 523 F. Supp. 1132 (D.D.C. 1981)(the root of §1415(e)(3) lies in the Mills consent decree). Review of both cases shows that the status quo provision of the consent decree was intended to prevent the public schools from excluding children on the basis of their handicaps, rather than to place an impediment to parents' changing their child's placement.

In Mills, a class of seven children sued to compel the D.C. school system to provide them with "immediate and adequate education and educational facilities in the public schools or alternative placement at public expense." 348 F. Supp. at 868. Several of the named plaintiffs

had been excluded from the public schools as "behavior problems", others as "health problems". Id. at 869-70. Mills ruled their exclusion without opportunity for hearing or review violated constitutional guarantees.[22/] Accordingly, the Mills consent decree required a hearing prior to the "exclusion of any child from public school or to the identification of a child as in need of a special education program." 348 F. Supp. at 878. Pending the hearing, the consent decree further required

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22/ While subsequent United States Supreme Court Cases such as San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973), have undermined the constitutional basis for the Mills finding, Mills remains relevant because it identified for Congress prevalent school district practices and suggested a solution. See Rowley, supra, 458 U.S. at 197 n.21.

the school system to maintain the status quo in language nearly identical to 1415(e)(3):

> Pending the hearing and receipt of notification of the decision, there shall be no change in the child's educational placement unless the principal ... shall warrant that the continued presence of the child in his current present program would endanger the physical well-being of himself or others.

Id. at 883. The PARC consent decree contains a similar state provision designed to respond to the exclusion of handicapped children from the Pennsylvania public schools. The consent decree provides for hearing prior to exclusions and orders that, except in certain extraordinary circumstances:

> No child of school age who is mentally retarded ... shall be subjected to a change in educational status without first being accorded notice and the opportunity of a due process hearing ... this

> provision shall also apply to any child who had never had an educational assignment.

343 F. Supp. at 303.

These consent decree provisions, nearly identical in language to §1415(e)(3), make clear that the Congressional purpose was similar to that of the Mills and PARC courts -- to ensure that handicapped children would not be excluded from the school system or "dumped" into inadequate classes while hearings and litigation regarding their status occurred. Otherwise, parents might feel financially constrained to keep their handicapped child in an inappropriate placement, or a school system might be able to use the administrative hearing as a way to delay making an appropriate placement for the child. Both results would bring about the

very exclusion that Congress passed the Act to correct.

The heart of the procedural safeguards afforded to parents is their ability to reject the IEP offered by a local educational agency and to have "an impartial due process hearing" conducted by the State educational agency which eventually results in a decision as to what the appropriate placement for their child is. 20 U.S.C §1415(b)(2), 34 C.F.R. §300.506.[23/] In the present case,

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23/ Petitioner's suggestion (Brief at 50) that the parents should be required to apply to the court for a preliminary injunction before withdrawing their child from what they consider to be an inappropriate placement runs counter to the Act's purpose. Any procedure requiring resort to the courts for injunctive relief in the first instance would subvert the detailed administrative review

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the Panicos followed precisely the state and federally mandated procedures; and, as a result of those procedures, the hearing officer found that the placement offered by the Town was not appropriate, while educating the Panico's son at the Carroll School was the least restrictive appropriate placement. Congress could not have intended to provide the Panicos with the opportunity to convince the hearing officer that the placement offered by the local educational agency was not appropriate and then have intended §1415(e)(3) to stand as

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afforded by the Act. Cf. Rowley, supra at 189. Petitioner's suggested procedure would only circumvent the Act's carefully crafted procedural safeguards and the state's opportunity to resolve placement issues through mediation and administrative hearing.

a barrier to their receiving payment from the town even after the hearing officer has decided the case in their favor. Such relief would be meaningless.[24/]

24/ If this Court concludes that Burlington's interpretation of §1415(e)(3) is generally correct, then there are numerous specific factual issues which would have to be litigated on remand before applying this interpretation to the present case. For example, is it accurate to say that the Panicos moved Michael from his "then current placement"? Michael was in a 502.2 prototype at the Memorial School. Burlington and the Panicos both agreed that this placement was not correct, and Burlington proposed to move Michael to a 502.4 placement at Pine Glen School. Thus, the factual predicate of Burlington's argument is missing. Moreover, Mr. Panico has testified that he was specifically told by Mr. Michael (superintendent of Burlington School Systems) in August, 1979 that, if he prevailed at the hearing, Burlington would abide by the decision (R.A. II, 3rd day, at 39-42). The district

(Footnote continued on following page)

III. MASSACHUSETTS LAW COMPELS THE SAME RESULT AS THE FEDERAL ACT

As Respondent Panico has argued above, the Court of Appeals was clearly correct in its construction of §§1415(e)(2) and 1415(e)(3). The former section authorizes a district court to award tuition reimbursement to the prevailing party in appropriate circumstances, and the latter section does not operate as a bar to the award of that relief.

Moreover, the Act implements its goals through a cooperative federal and state funding and regulatory scheme. As this Court has noted, the "primary responsibility" for

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court made no findings on this point because of its ruling on §1415(e)(3). However, the existence and significance of such an agreement would have to be considered on remand.

implementing the education guaranteed by the Act rests with state and local educational agencies. Rowley, supra, 458 U.S. at 207. The result required by federal law is also dictated by the statutes and regulations which implement the Act in Massachusetts. See M.G.L. c.71B and Mass. Admin. Code tit. 603, §28.100 et. seq.[25/]

In accordance with the Act's requirements for participating states, 20 U.S.C. §1413, Massachusetts law requires each school district to prepare "a special education program" when a child is identified as having special needs. Mass. Gen. Laws Ann. ch.71B, §3. Further, in accordance with the requirements of the Act, 20

25/ Pursuant to the Act, Massachusetts has filed a state plan demonstrating that its legislation and regulations are in compliance with the provisions of the Act.

U.S.C. §1413, Massachusetts law provides that "parents . . . may refuse the educational program" developed by the school district and request a hearing. Mass. Gen. Laws Ann. ch.71B, §3.

In a provision analogous to §1415(e)(3), Massachusetts requires that a handicapped child be placed in public school during the pendency of the hearings provided by Massachusetts law:

> Between the time that a child is referred for an evaluation and the time that a placement for the child is agreed upon, ordered or otherwise required ... the child shall remain in his/her educational placement....

Mass. Admin. Code tit. 603, §28.327.0.

Massachusetts regulations specifically provide for retroactive tuition reimbursement where the

parent's placement of the child is found to be appropriate.[26/] When a parent independently enrolls a child in private school and the hearing process

> determines that the IEP developed by the school committee is inadequate and the parent's choice of placement is appropriate, the school committee shall pay the full cost of instruction and support actually rendered or furnished to such child by the private school,

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26/ In certain situations, Massachusetts requires parents to be reimbursed by the school committee even though the parents' placement is not necessarily the appropriate placement: 1) where the child is placed in a special education setting by agreement between the parents and school committee, even if it later turns out that the placement is not an appropriate one; and 2) where the child is placed by the State Department of Education because the school committee and parents have been unable to agree on a placement and the child is not in a setting approved by the school committee. See Mass. Admin. Code tit. 603 §28.327.3.

> retroactive to the date the inadequate IEP was rejected by the parent....

Mass. Admin. Code tit. 603, §28.504.5(f)(emphasis added).

In Amherst-Pelham Regional School Committee v. Department of Education, 376 Mass. 480 (1978), the Massachusetts Supreme Judicial Court interpreted the Massachusetts counterpart of §1415(e)(3) in a similar manner to the Court of Appeals' ruling in this case. In affirming the hearing officer's order of tuition reimbursement retroactive to the date the parents had rejected the educational plan and sought a review, the court held that

> retroactive reimbursement to parents who have provided necessary services at their own expense, from the date at which they rejected the school committee's inadequate plan, is consistent with the statutory scheme.

376 Mass. at 483.

The court reasoned that reimbursement best served the statutory goal to provide public education:

> If the statutory system had worked as intended, the child would have received publicly funded educational services after his parents had accepted the originally proposed plan.

376 Mass. at 492.

Although in maintaining their child in private school the parents "assumed a financial risk" that the hearing officer "would recommend a different placement," reimbursement for an appropriate placement "places the parents and child precisely where they would have been had the school committee initially fulfilled its statutory obligations in evaluating the child." Id. at 493.

The Supreme Judicial Court specifically rejected the school committee's argument that the parents'

violation of the Massachusetts status quo provisions barred their right to receive funding. The court found these provisions bore no relationship to funding:

> the language ... simply addresses the practical question of placement during the appeals process, a period of time in which no program has yet been adopted. The provisions seek to ensure that, during this period, the child experiences the least possible disruption in his educational program. They in no way undercut the school committee's responsibilities initially to provide an adequate educational plan.

Id. at 494.

Thus, the policy governing the Massachusetts status quo provision, as construed by the Massachusetts court, is directed toward protecting the child but not toward preventing the parents from eventually obtaining reimbursement. The result under the Massachusetts statutes and

regulations, which fulfills Massachusetts' obligation as a participating state under the Act, is consistent with the Court of Appeals' rulings in this case.

CONCLUSION

In its opinion, the Court of Appeals drew a roadmap for the district court to deal with several difficult and complex issues arising under the Act, including several pertaining to reimbursement. The court properly concluded that, to have any meaning, the Act must afford the district court the power under §1415(e)(2) to award tuition reimbursement; such an award is not automatic, but depends instead upon the district court's reasoned exercise of discretion to make sure that the relief it grants is "appropriate".

Moreover, the provisions of §1415(e)(3) could not possibly have been intended, the Court of Appeals held, to bar a parent from obtaining tuition reimbursement in an otherwise appropriate case. As the court noted, handicapped children are not "non perishable commodities able to be warehoused until the termination" of judicial proceedings.[27] (Pet. 130a).

Boiled down to its essence, what Burlington offers parents like the Panicos is an interpretation of the Act which makes one wonder why

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27/ Michael Panico was in third grade when the dispute over his IEP began. If Burlington is correct that he must remain in his current placement through the termination of judicial proceedings, he would not be entitled to a change in placement until next fall at the earliest, when he will be old enough to begin tenth grade.

Congress would have bothered to pass it. Parents dissatisfied with a school's proposed placement for their handicapped child apparently must leave the child in that placement while the administrative and judicial review grinds on or run the risk of being charged with "self-help" in "violation" of §1415(e)(3). If the parents silently wait and obtain a favorable decision from the hearing officer or court, such victory is bittersweet indeed; for it confirms that the child was left in an inappropriate placement during the intervening years and offers the parents nothing more than a proper plan for future years.

The Court of Appeals saw through the irony such an interpretation of the Act would produce. Its ruling that §1415(e)(2) provides the district

court with authority to award reimbursement to the prevailing party in appropriate circumstances and that the parental rights afforded by §1415(e)(3) does not constitute a bar to the district court's discretion to award reimbursement must be affirmed if the Act is to accomplish the goals Congress intended.

Respectfully submitted,

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February 15, 1985

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Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Education of the Handicapped Act".

* * *

(c) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. §1401.

Definitions

(a) As used in this chapter --

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped

child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. (18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under Section 1414(a)(5) of this title.

20 U.S.C. §1415.

Procedural safeguards

(e)(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear

additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(e)(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

Mass. Gen. Laws Ann. ch. 71B

§3. Identification of school age children with special needs; needs; diagnosis of needs; proposal of program; consent; evaluations and assessments of child and program; admission or placement; procedures; restrictions; regulations; records

In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health and public health and with assistance of the department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs,

provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education.

No school committee shall refuse a school age child with special need admission to or continued attendance in public school without the prior written approval of the department. No child who is so refused shall be denied an alternative form of education approved by the department, as provided for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency or through any other program which is approved for the child by the department.

No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department.

Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining

whether such child requires special education, the school committee shall notify the parents or guardians of such child in writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the department and the departments of mental health and public health and the right to appeal from any evaluation, first to the department, and then to the courts.

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist.

The department jointly with the departments of mental health and

public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the needs of the child is provided.

Those persons assessing said child shall maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education and medical treatment best suited to the child's needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counseling services. When the suggested course of study is other than regular education those persons assessing said child shall present a method of monitoring the benefits of such special education and conditions that would indicate that the child should return to regular classes, and a comparison of expected outcomes in regular class placement.

If a child with special needs requires a medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available, in accordance

with regulations promulgated jointly by the departments of education, mental health, public health and social services in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made according to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the departments of mental health and public health or, at private expense, from any specialists.

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluation, shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate

education program. At the conclusion of said hearing, with the advice and consultation of appropriate advisory councils established under section one P of chapter fifteen, the department may recommend alternative educational placements to the parents, guardians or persons with custody, and said parents, guardians and persons with custody may either consent to or reject such proposals. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parents, guardian or persons with custody except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

If the parents, guardians or persons with custody reject the educational placements recommended by the department and desire a program other than a regular education program, the matter shall be referred to the state advisory commission on special education to be heard at its next meeting. The commission shall make a determination within thirty days of said meeting regarding the placement of the child. If the

parents, guardians or person with custody reject this determination, they may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child may be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

Within ten months after placement of any child in a special education program, and at least annually thereafter the child's educational progress shall be evaluated as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned.

Evaluations and assessments of children and special education programs shall remain confidential and be used solely for the administration of special education in the commonwealth, including, but not limited to, inspection by the department and regional and state advisory councils to insure that every special education program does benefit the children there assigned.

Mass. Admin. Code tit. 603

§28.327.0
Placement pending evaluation and administrative appeal.

Between the time that a child is referred for an evaluation and the time that a placement for the child is agreed upon, ordered, or otherwise required pursuant to these regulations and consented to by the parent, the child shall remain in his/her current educational placement, subject to the following:

§28.327.1

A child who, at the time of referral for evaluation, was in the regular education program, shall remain in that regular education program, unless the school committee or the child's parents submit a written statement to the Regional Branch Office of the Division showing that the child's remaining in such program endangers the health or safety of the child or substantially disrupts such program for other children. The Regional

Branch Office may refer the matter to the Bureau of Special Education Appeals. If the showing is made, the Regional Branch Office (or the Bureau of Special Education Appeals, if the matter has been referred to it) shall within thirty days of the written statement approve an appropriate placement for the child.

§28.327.2

A child who, at the time of referral for evaluation, was in a special education program paid for by the school committee shall remain in that special education program unless the child's parents wish the child to be in the regular education program, in which case the child shall be placed in such regular education program; unless the school committee submits a written statement to the Regional Branch Office of the Division showing that the child's remaining in such special education program or being placed in the regular education program (if requested by the parents) endangers the health or safety of the child or substantially disrupts such program for other children. The Regional Branch Office may refer the matter to the Bureau of Special Education Appeals. If the showing is made, the Regional Branch Office (or the Bureau of Special Education Appeals if the matter has been referred to it) shall, within thirty days of the written statement, approve an appropriate placement for the child.

§28.327.3

A child who, at the time of referral for evaluation, was not in an educational program approved by the school committee, shall be placed in an appropriate program as determined by agreement between the school committee and the child's parents. When such agreement cannot be reached, the Regional Branch Office of the Division (or, upon referral by the Regional Branch Office, the Bureau of Special Education Appeals) shall, within thirty days of notice, select an appropriate program for the child to be provided by the school committee. If the program so selected is a special education program, the child may be placed in it only with parental consent. This paragraph shall not apply to a child who is below the minimum age for regular public school attendance, unless the child has been found to have a substantial disability. Nothing in this paragraph shall be construed to limit the operation of ¶ 205.1, subject to ¶ 504.5(f).

§28.504.5

Funding arrangements for private placements.

Subject to the provisions of Section 18 of Chapter 766 of the Acts of 1972 for "grandfathered" children, and the provisions of ¶ 504.5(f), the following provisions shall apply in each case in which a school committee,

pursuant to ¶¶ 504.2 and 504.3, places a child in need of special education in a private school:

§28.504.5(f)

If a child's parent enrolled the child in a Division-approved private day school or residential school program and appealed the child's IEP to the Bureau of Special Education Appeals or the SAC under Chapter 4, and the Bureau of Special Education Appeals or the SAC determines that the IEP developed by the school committee is inadequate and the parent's choice of placement is appropriate, the school committee shall pay the full cost of instruction and support actually rendered or furnished to such child by the private school, retroactive to the date the inadequate IEP was rejected by the parent or could reasonably have been expected by the parent. The school committee shall enter into an agreement or contract with the private school, and shall report to the appropriate Regional Branch Office of the Division that the placement has been made.

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No. 84-433

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

SCHOOL COMMITTEE OF THE
TOWN OF BURLINGTON, et al.,
Petitioners,
v.
DEPARTMENT OF EDUCATION OF THE
COMMONWEALTH OF MASSACHUSETTS, et al.,

Respondents

On Writ Of Certiorari To
The United States Court Of
Appeals For The First Circuit

BRIEF FOR THE RESPONDENT Department Of Education Of The Commonwealth Of Massachusetts

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QUESTIONS PRESENTED

1. May the District Court, under the Education of the Handicapped Act, order a local education agency to reimburse the parents of a handicapped child for private school tuition and related expenses incurred by the parents for an appropriate placement while administrative and judicial review proceedings were pending?

2. Where parents have rejected a proposed Individualized Education Program, claimed an administrative appeal, and then enrolled their handicapped child in a private school, does § 615(e)(3) of the Education of the Handicapped Act operate as an absolute bar to tuition reimbursement, if the State and the District Court later determine that the private school was the appropriate educational placement?

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No. 84-433

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

SCHOOL COMMITTEE OF THE
TOWN OF BURLINGTON, et al.,
Petitioners,

v.

DEPARTMENT OF EDUCATION OF THE
COMMONWEALTH OF MASSACHUSETTS, et al.,
Respondents.

On Writ Of Certiorari To
The United States Court Of
Appeals For The First Circuit

OPINIONS BELOW

1. The Opinion of the Court of Appeals for the First Circuit (Pet. App. 87a-143a)[1/] is reported at 736 F.2d 773.

1/ "Pet. App." denotes the appendix to the petition for writ of certiorari.

(footnote continued)

2. The March 7, 1983, Opinion of the District Court (Pet. App. 69a-86a) is reported at 561 F. Supp. 121.

3. The August 13, 1982, Memorandum of Decision of the District Court (Pet. App. 57a-68a) is unreported.

4. The Opinion of the Court of Appeals for the First Circuit (Pet. App. 36a-47a) is reported at 655 F.2d 428.

5. The November 19, 1980, Memorandum of Decision of the District Court (Pet. App. 28a-34a) is unreported.

6. The Decision of the Bureau of Special Education Appeals (Pet. App. 1a-27a) is unreported.

JURISDICTION

The judgment of the Court of Appeals

(footnote continued)
Each of the opinions below is set forth in full at the referenced pages of that appendix.

was entered on May 29, 1984. Pet. App. 144a. A motion for rehearing and rehearing en banc was denied on June 29, 1984. Pet. App. 146a-148a. On September 18, 1984, a petition for writ of certiorari was filed presenting six questions for review. The petition was granted on December 3, 1984, but limited to questions I and V. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Education of the Handicapped Act, Pub. L. No. 94-142, 89 Stat. 773 (1975), 20 U.S.C. §§ 1400 et seq., and the implementing regulations, 34 C.F.R. Part 300, are set forth in the appendix to this brief at 1a-10a.

STATEMENT

1. The Education of the Handicapped Act (EHA), enacted in 1975, presents "an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out." Board of Education v. Rowley, 458 U.S. 176, 179 (1982) (citations and quotations omitted). Ambitious as it is, the EHA and its implementing regulations are exceedingly complex and require full explication here. The EHA provides federal money to State

educational agencies which have in effect a policy that assures that all handicapped children receive a "free appropriate public education." 20 U.S.C. § 1412(1). "Free appropriate public education" consists of "special education and related services . . . provided at public expense," meeting "the standards of the State educational agency" at the appropriate pre-school, elementary or secondary level, and "provided in conformity with the individualized education program . . . ." 20 U.S.C. § 1401(18).

The "individualized education program" (IEP) is the written document setting forth for each handicapped child, the child's educational performance, instructional goals and objectives, and "specific educational services to be

provided to such child, and the extent to which such child will be able to participate in regular educational programs." 20 U.S.C. § 1401(19). The IEP must be prepared at least annually, and is to be developed in a meeting among a representative of the local educational agency, the teacher, the parents, and, where appropriate, the child. Id.

The State educational agency must also provide assurance that educational programs for the handicapped administered by a local educational agency will comply with the requirements of the EHA, be under the general supervision of the State educational agency, and meet education standards of the State educational agency. 20 U.S.C. § 1412(6).

The cornerstone of the EHA is the extensive procedural safeguards available to the parents of a handicapped child. Parents must be given an opportunity to examine records relevant to the identification, evaluation, and placement of the handicapped child and to obtain an independent educational evaluation (20 U.S.C. § 1415(b)(1)(A)); must be given prior notice of any proposed change in the educational placement (20 U.S.C. § 1415(b)(1)(C)); and must have an opportunity to present a complaint to school authorities "with respect to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education." 20 U.S.C. § 1415(b)(1)(E). If the parties are not satisfied with the

response of school authorities, they are entitled to a "due process" hearing before an impartial hearing officer. 20 U.S.C. § 1415(b)(2).[2/]

At the administrative hearing, parents have the right to be accompanied by counsel, present evidence, and cross-examine witnesses. The hearing officer must make written findings and conclusions. 20 U.S.C. § 1415(d). Any party aggrieved by the findings of the state agency may seek judicial review in state or federal court. 20 U.S.C. § 1415(e)(2). In a proceeding for judicial review in federal court, the court shall give "due weight" to the decision

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2/ In Massachusetts, that hearing is conducted at the state level by the Department of Education's Bureau of Special Education Appeals. There is no local educational agency level hearing under Massachusetts procedures.

of the state administrative agency[3/] and "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Of significance here, "[d]uring the pendency of [the administrative and judicial proceedings], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . ." 20 U.S.C. § 1415(e)(3)

2. Michael Panico is the subject of the protracted administrative and judicial proceedings in this case. He is a child with above-average-to-superior intelligence but one who has a severe learning disability which interferes with

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3/ Rowley, 458 U.S. at 206.

his ability to read, write, spell, tell time, and differentiate between right and left or up and down.[4] The parties agree that Michael is handicapped within the meaning of the EHA[5] and, therefore, is entitled to special education. Pet. App. 15a.[6] The factual dispute centers around the origin and nature of his learning disability[7] and the appropriate educational placement to meet

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4/ See Joint Appendix (J.A.) 26, 334, 337-39.

5/ See 20 U.S.C. § 1401(1) and (15).

6/ The EHA defines "special education" as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child . . . ." 20 U.S.C. § 1401(16).

7/ "[C]hildren with specific learning disabilities" are defined under the EHA as "children who have a disorder in one or more of the basic psychological processes involved in understanding or

(footnote continued)

his individual needs. The parties also disagree on who shall ultimately bear the costs of the private school expenses incurred during the administrative and judicial proceedings.[8/]

a. Michael attended the Memorial School, a public school in Burlington,

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(footnote continued)
in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." 20 U.S.C. § 1401(15).

8/ The Court of Appeals has remanded the issues of appropriate placement and financial responsibility therefor for resolution at a new trial. Pet. App. 119a-20a. Thus, this case is actually before the Court as an interlocutory matter and this Court's opinion will not fully and finally resolve the dispute among the parties. For this reason, perhaps the writ should be dismissed as improvidently granted.

Massachusetts, from kindergarten through the third grade. As early as the first grade, the parents and the school disagreed about the source of Michael's learning problems. Burlington believed them to be primarily the result of emotional problems, whereas the parents suspected a neurologically-based learning disability. J.A. 38-39. At the end of first grade, the parents requested that the school perform a full special education evaluation. Id. Although an evaluation was conducted, Burlington concluded that Michael did not need special education and did not prepare an IEP. Michael proceeded to the regular second grade class with no specialized instruction.

During the second grade, Michael performed poorly in school, particularly in

reading. He also suffered from severe migraine headaches. His pediatrician referred him to a pediatric neurologist at the Massachusetts General Hospital for a complete neurological examination. Those tests showed Michael to be extremely bright but indicated clear evidence of a major learning disability. J.A. 41; Court of Appeals Appendix (C.A. App.) Vol. IV, 332. As a result of this testing, and at the parents' request, Burlington developed an IEP for Michael in March of his second grade year covering the remainder of the second grade and the third grade. The IEP, which the parents accepted, provided Michael with individual tutoring by a reading special-

ist for one hour each day, and individual and group counselling.[9/] J.A. 42; C.A. App. Vol. IV, 337-41.

At the beginning of the third grade, without informing the parents or obtaining their consent, Burlington halved Michael's individual reading tutorial from one hour to thirty minutes per day.

9/ Massachusetts' special education regulations, which are codified at 603 Code of Massachusetts Regulations (C.M.R.) 28.00 provide for a continuum of special education program prototypes which range from education in the regular classroom with modification (603 C.M.R. 28.00, ¶ 502.1), to programs with varying amounts of time away from the regular classroom (less than 25% - 603 C.M.R. 28.00, ¶ 502.2, up to 60% - 603 C.M.R. 28.00, ¶ 502.3), to substantially separate public school programs (603 C.M.R. 28.00, ¶ 502.4), private day school placements (603 C.M.R. 28.00, ¶ 502.5), private residential school placements (603 C.M.R. 28.00, ¶ 502.6), and hospital placements (603 C.M.R. 28.00, ¶ 502.7). Michael's IEP for the third grade provided for a program prototype 502.2 (less than 25% away from the regular class) placement.

J.A. 44; Pet. App. 20a. Throughout the third grade, Michael's reading skills regressed and he was showing little progress in school generally. J.A. 44; Pet. App. 125a.

In May and June of 1979, the parents met on several occasions with school officials to discuss an appropriate educational plan for the fourth grade. J.A. 44-46. Burlington and the parents agreed that Michael's continued special education placement at the Memorial School was not appropriate for his education needs. Pet. App. 13a. The parties still did not agree, however, on the source of Michael's learning difficulties; that is, whether they stemmed from emotional problems as the school officials believed, or whether they were neurologi-

cally-based as the parents believed. J.A. 45-46. The school agreed to have Dr. Lott, the pediatric neurologist from Massachusetts General Hospital who had previously tested Michael, coordinate the psychological testing necessary for the preparation of the IEP. J.A. 5. Nevertheless, when the IEP for Michael's fourth grade was prepared in the early summer of 1979, it was without the benefit of Dr. Lott's latest test results. J.A. 204, 330-31.

The focus of this IEP was on the development of Michael's reading skills. J.A. 7. It provided, however, for Michael's transfer from his current special education program at the Memorial School to a substantially separate special class at the Pine Glen School,

another public school in Burlington.[10/] J.A. 13. That class was taught by a Mr. McAleer and was comprised of six or seven students, four or five of whom were identified as having either behavioral or emotional problems. Pet. App. 7a. The separate class was sometimes referred to as the "primary adjustment class." Pet. App. 7a.

b. The parents rejected the fourth grade IEP on July 3, 1979, setting in motion the administrative appeal before the Massachusetts Department of Education's (Department) Bureau of Special Education Appeals (BSEA) which ultimately gave rise to the judicial proceedings.

10/ Under Massachusetts regulations this program was designated as a prototype 502.4 (substantially separate) program. 603 C.M.R. 28.00, ¶ 502.4.

J.A. 18, 25. On July 10, 1979, Dr. Lott informed the parents that Michael's tests showed a "severe learning disorder characterized by perceptual difficulties," and recommended a highly specialized setting for children with learning handicaps, such as the Carroll School, an approved private special education school in Lincoln, Massachusetts. J.A. 26.

During the summer, the parties attempted mediation before the BSEA in order to resolve the dispute over the fourth grade (1979-80) IEP.[11/] These

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11/ Paragraph 400.0 of the Massachusetts special education regulations provides for a mediation or conference conducted by the Department to encourage informal resolution of disputes over proposed special education programs. If informal resolution proves unsuccessful or the parents do not wish to participate in such mediation, the parents or the local educational agency may request a hearing before the BSEA. 603 C.M.R. 28.00, ¶¶ 400.0, 401.1, 401.2.

attempts proved unsuccessful and the parents requested a hearing before the BSEA. J.A. 27, 34. In September 1979, the parents enrolled Michael at the Carroll School.

c. Between September 1979, and November 1979, a lengthy administrative hearing was held before the BSEA to determine Michael's appropriate educational placement for the fourth grade, the 1979-80 school year.12/ On January 31, 1980, the BSEA issued a decision holding that Mr. McAleer's "primary adjustment" class was not the appropriate educational placement for the 1979-80 school year. The hearing officer found, inter alia, that the student composition of Mr.

12/ Hearings were held on September 26, October 30, 31, and November 1, 1979, producing a hearing transcript of over 575 pages and more than 125 exhibits. See C.A. App. Vols. III, IV.

McAleer's class, the reading and teaching methods used there, and the teacher's lack of specialized training in teaching children with learning disabilities like Michael's rendered Mr. McAleer's class inappropriate to meet Michael's special educational needs. Pet. App. 14a-15a. The hearing officer instead found that the Carroll School, which provided small-group instruction in a language-based program for children with learning disabilities with a focus on reading and related skills and individual tutoring in reading and spelling, was appropriate to Michael's special needs and was "the least restrictive adequate program within the record." Pet. App. 14a, 16a. The hearing officer's rejection of Burlington's proposed IEP was also based, in

part, on extensive substantive and procedural violations committed by Burlington. Pet. App. 13a, 17a-21a. Accordingly, the hearing officer ordered Burlington to pay for Michael's education at the Carroll School for the 1979-80 school year. Pet. App. 23a.

3. On February 26, 1980, Burlington filed a two-count complaint in the United States District Court under 20 U.S.C. § 1415(e)(2) and Mass. Gen. Laws Ann. ch. 71B (West 1982), St. 1972, c. 766, § 11, the parallel state statute, seeking judicial review of the state administrative decision. J.A. 175-78. Burlington named the parents and the Department as defendants.

a. The early months of the litigation involved a dispute over implementa-

tion of the BSEA order that Burlington pay for the tuition and related expenses at the Carroll School for the 1979-80 school year.[13/] On May 8, 1980, Burlington moved for a stay of the BSEA decision which was denied by the District Court on July 24, 1980. J.A. 1. By September 1980, Burlington still had not paid for the previous school year, nor did it plan to pay for the 1980-81 school year which was about to commence. Accordingly, the Department and the parents sought preliminary injunctions requiring Burlington to comply with the BSEA decision, as well as to pay for Michael's continued placement at the Carroll

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13/Under state law, the BSEA decision is to be implemented forthwith and a complaint for judicial review does not operate as a stay of the decision. See 603 C.M.R. 28.00, ¶ 410.0; Mass. Gen. Laws Ann. ch. 30A, § 14(3) (West 1979).

School. J.A. 1. On February 12, 1981, the District Court ordered Burlington, pending a final determination on the merits, to pay the Carroll School for the current school year (1980-81) as well as to reimburse the parents $8,837.97 for expenses incurred during the previous school year (1979-80). J.A. 187-188.

b. At the same time that the parties were litigating the interim funding issue, the case on the merits was proceeding under the state law claim raised in the complaint. On November 19, 1980, the District Court granted summary judgment for the parents and the Department.[14/] Pet. App. 28a-34a. Utilizing

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14/ Shortly thereafter, the Department informed Burlington that it would freeze all its special education funds unless it complied with the BSEA order. Pet. App. 40a.

the state law standard of judicial review,[15] the District Court agreed with the BSEA that the Carroll School, and not Mr. McAleer's special class, was the appropriate educational placement for Michael for the school year 1979-1980.

c. Burlington appealed from the summary judgment decision as well as the several interlocutory orders regarding the interim funding. The appeals were consolidated and resulted in the first Court of Appeals opinion in this case. Pet. App. 36a-56a.

The Court of Appeals vacated the District Court's decision on the state law

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15/ Under this standard, the court was required to uphold the BSEA decision if it was supported by "substantial evidence." See Mass. Gen. Laws Ann. ch. 30A, § 14(7)(e) (West 1979).

claim holding that the "preponderance of the evidence" standard of review required by the EHA preempts the more limited "substantial evidence" state standard of review. Pet. App. 42a-43a. On the interim funding issue, the Court of Appeals held that the funding of a private placement pending judicial review should be determined in accordance with traditional preliminary injunction standards. It further held that the District Court incorrectly based its interim funding decisions on § 1415(e)(3), ruling that the provision governs disputes over educational placements, rather than the funding of those placements. Pet. App. 46a-47a.

d. Since the Court of Appeals ruled that the EHA provided the sole mechanism for judicial review, the parties pre-

pared for trial under § 1415(e)(2). In a comprehensive pretrial order, the District Court limited the issues to be tried, dismissed a counterclaim by the parents for general damages under the EHA and 42 U.S.C. § 1983, and denied Burlington's motion for summary judgment. Pet. App. 48a-56a.[16/]

In May 1982, the District Court held a four-day trial under the federal count of Burlington's complaint. On August 13, 1982, the District Court set aside the BSEA decision and held that the appropriate placement for Michael for the 1979-80 school year was not at the Carroll School, but in the substantially separate class in the public school

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16/ Burlington argued that it was entitled to summary judgment on the basis of § 1415(e)(3), because the parents had enrolled Michael in the Carroll School while the administrative proceedings were pending.

proposed by Burlington. Pet. App. 66a-67a. The District Court also ruled that for the school years 1980-81 and 1981-82, the parents failed to meet their burden of showing that the public school placement would not have been appropriate.[17/] Burlington then sought to be reimbursed by the parents for monies it paid to the Carroll School for the school years 1980-81 and 1981-82, by filing a proposed form of judgment which included

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17/ No IEPs have been prepared for Michael since the judicial proceedings began in 1980. Although Burlington has claimed repeatedly that the parents improperly refused to make Michael available for evaluations during the course of the litigation, the parents have denied this and the District Court specifically refused to hear evidence on this issue. Pet. App. 55a-56a; J.A. 379. In any event, the Court of Appeals held that a local educational agency is required to prepare annual IEPs whether the child is made available for evaluation or not. Pet. App. 123a.

an award of reimbursement.[18]

d. The case next was transferred to Senior Circuit Judge Aldrich (sitting in the District Court by designation) to determine whether Burlington was entitled to retroactive reimbursement from the parents and whether the parents could recover from Burlington for the expenses they paid for the school year 1979-80.[19] Judge Aldrich held that Burlington could recover from the parents the money it had paid to the Carroll School for tuition and related expenses during the judicial proceedings. The

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18/ Burlington sought to recover from the parents a total of $12,844.66.

19/ Judge Aldrich was considering similar reimbursement issues in two other cases. Accordingly, the three cases were consolidated for the purpose of determining the reimbursement issues only. Pet. App. 70.

court also held that the parents could not recover from Burlington the money they had expended for the 1979-80 school year. Pet. App. 82a-85a.

Accordingly, on May 9, 1983, judgment was entered for Burlington, and the parents were ordered to repay Burlington $8,449.00.[20/] The District Court also ruled that Burlington was not responsible for the expenses the parents incurred for the 1979-80 school year. J.A. 407.

e. The Department and the parents appealed from the District Court's decision setting aside the BSEA decision. This appeal resulted in the second Court

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20/ This amount represents the tuition and related expenses paid by Burlington for the Carroll School for two years less the per-pupil amount Burlington received from the state for those years. J.A. 407.

of Appeals opinion which is now before this Court. Pet. App. 87a-143a. In a comprehensive opinion, the Court of Appeals addressed "a wide variety of novel issues under the Act. These include[d]: the choice of law to be utilized in the state due process hearings; the impact of a school system's regulatory violations on the validity of a child's IEP; the weight to be accorded to the state administrative record and the hearing officer's findings upon appeal; the meaning of the term 'additional evidence' as used in the Act; the appropriate burden of proof at trial for the years subsequent to the contested IEP[;] and the significance of a diagnostic determination by the trial judge." Pet. App. 88a.

The Court of Appeals concluded,

inter alia, that the District Court failed to give proper weight to the BSEA's findings with respect to Burlington's substantive and procedural violations. It, therefore, set aside the decision and remanded the case for a new trial in accordance with the guidelines set forth in the opinion. Pet. App. 139a.

The Court of Appeals also addressed the reimbursement issue that was certain to arise after a final decision on remand, wherein Burlington and the parents each sought to be reimbursed for monies spent on Michael's educational placement during the five year odyssey through the administrative and judicial review proceedings. The court's consideration of the availability of tuition reimbursement is the last in a line of First Circuit

decisions in which the reimbursement issue has arisen in varying factual and procedural contexts.[21]

After examining the language of the EHA, its legislative history, its goals, and decisions from other circuits, the Court of Appeals concluded that § 1415(e)(2), which empowers a district court to grant "appropriate relief," permits the district court, in its discretion, to order retroactive reimbursement to the party who prevails after judicial review. Pet. App. 131a-133a. Thus, on remand, if Burlington succeeds in showing that its proposed educational placement

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21/ See Town of Burlington v. Department of Education, 655 F.2d 428 (1st Cir. 1981); Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982) (Doe v. Anrig I); Doe v. Brookline School Committee, 722 F.2d 910 (1st Cir. 1983); Doe v. Anrig, 728 F.2d 30 (1st Cir. 1984) (Doe v. Anrig II); Hurry v. Jones, 734 F.2d 879 (1st Cir. 1984).

was appropriate under the EHA, it may seek to recover from the parents monies it expended during the appeal period. Conversely, if the District Court finds that the private, not public school, was the appropriate placement for Michael, the parents may be permitted to seek reimbursement from Burlington. The court stated, "whether to order reimbursement, and at what amount, is a question determined by balancing the equities." Pet. App. 137a. The opinion sets forth guidelines for determining the circumstances under which an award of reimbursement would be considered "appropriate relief" under the EHA. These include whether the parties have complied with state and federal regulations, have acted reasonably, and have acted in good faith.

Pet. App. 137a-38a.

The Court of Appeals further held that the parents' actions did not contravene § 1415(e)(3), the so-called "interim placement" provision, and, in any event, that section does not act as an automatic bar to the parents' right to seek reimbursement should they ultimately succeed in showing that the Carroll School was the appropriate placement. Pet. App. 132a.

Finally, the court concluded that since, in January 1980, the BSEA found the Carroll School to be the appropriate placement and ordered the child placed at the Carroll School for the 1979-80 school year, the parents should not be held responsible for the costs of the

Carroll School from January through June 1980. Pet. App. 135a-37a.

On September 18, 1984, Burlington filed a petition for a writ of certiorari seeking review of the entire case to date.

On December 3, 1984, this Court granted certiorari, but limited review to questions I and V, those questions addressing the availability of retroactive reimbursement to the parents.

SUMMARY OF ARGUMENT

Against this complex background, this case presents straight-forward questions of statutory interpretation of two provisions of 20 U.S.C. § 1415(e), that section of the EHA which sets forth the procedural safeguards available to the parents of a handicapped child.

I. The first question to be addressed is whether the district court may order a local educational agency to reimburse parents for private school tuition and related expenses they incurred during the pendency of the administrative and judicial proceedings. The language, history, and purpose of the EHA dictates an affirmative answer to this question. Section 1415(e)(2) authorizes a district court to "grant such relief as [it] determines is appropriate." The ordinary meaning of the word "appropriate" is "suitable", i.e., tailored to the facts and circumstances of each case. The term "appropriate relief" signifies a grant of equitable jurisdiction which includes the authority to order reimbursement. Since neither § 1415(e)(2) itself nor

any other provision of the EHA expressly precludes an award of tuition reimbursement, reimbursement may be awarded as "appropriate relief."

The EHA's legislative history demonstrates that Congress intended the question of financial responsibility for a private school placement to be resolved by the administrative and judical review mechanisms set forth in the EHA. Tuition reimbursement is also consistent with the EHA's overriding objective of providing a free and appropriate education for all handicapped children. Where a private school placement has been found to be appropriate, permitting tuition reimbursment ensures that the private placement is free. For a local educational

agency, tuition reimbursement only requires it to reimburse parents monies it would have paid to the private school had it proposed an appropriate placement initially. For parents, tuition reimbursement is often the only practical relief available where a local educational agency has failed to provide an appropriate placement.

The Court of Appeals properly concluded that tuition reimbursement should not be automatically awarded to the prevailing party, but should be available when it is warranted by such equitable considerations as the parties' compliance with state and federal requirements and their conduct and good faith throughout the development of the IEP and later proceedings. These criteria are consistent

with sound equitable principles and with the EHA's purposes and requirements.

II. The second question presented by this case is whether the parents' enrollment of their child in a private school operates as an automatic bar to an otherwise appropriate award of reimbursement. Section 1415(e)(3) states that a child is to remain in his current educational placement until the conclusion of the administrative and judicial proceedings unless his parents and the State or local educational agency otherwise agree.

In this case, it is unnecessary to determine the effect of § 1415(e)(3) on the availability of reimbursement because the parents' actions were not contrary to that provision. Both Burlington and

the parents agreed that Michael's educational placement should be changed. Moreover, the State educational agency, after a full administrative hearing agreed with the parents, not only that Michael's placement should be changed, but that he should be enrolled in the Carroll School.

Even absent an agreement between the parents and the State or local educational agency, § 1415(e)(3) may not be construed to require parents to choose between an education that is free and one that is appropriate. Section 1415(e)(3) governs disputes over interim placements; it does not govern a parent's ultimate right to reimbursement after prevailing on the merits. Interpreting § 1415(e)(3), which was intended to protect parents from unilateral actions by

school officials, to require parents to keep their child in an inappropriate educational placement is contrary to the EHA's requirement of a free appropriate education and the goal of encouraging parental involvement in special education.

To the extent that a parent's actions in enrolling their child in a private school are relevant to an equitable award under § 1415(e)(2), the parents' actions in this case were fully consistent with the EHA's mechanism for resolution of disuptes over a proposed IEP.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED, BASED UPON THE LANGUAGE, HISTORY, AND PURPOSES OF THE EHA, THAT THE DISTRICT COURT HAS THE DISCRETION TO AWARD TUITION REIMBURSEMENT TO THE PARENTS AT THE CONCLUSION OF THE JUDICIAL PROCEEDINGS.

A. An Award of Tuition Reimbursement Comes Within The District Court's Authority To Grant Appropriate Relief.

The Court of Appeals held that the District Court has the authority to award tuition reimbursement to the parents if the Carroll School is found to be the appropriate educational placement for Michael.[22/] The court further held

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22/ Burlington uses the term "damages" to frame the issues and bolster its argument. "Damages" may include, among other things, compensatory or punitive damages,

(footnote continued)

that reimbursement is not automatic; rather, it is based upon equitable considerations. Pet. App. 137a.[23/] It is Burlington's view that the District

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(footnote continued)
neither of which are at issue in this case. See, e.g., Marvin H. v. Austin Independent School District, 714 F.2d 1348, 1354-56 (5th Cir. 1983); Anderson v. Thompson, 658 F.2d 1205, 1213 (7th Cir. 1981); Miener v. State of Missouri, 673 F.2d 969, 979 (8th Cir.), cert. denied, 459 U.S. 909 (1982), see generally Hyatt, Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies, 29 U.C.L.A. L. Rev. 1, 42-51 (1981). The only remedy at issue here is tuition reimbursement. To avoid confusion, we therefore follow the Court of Appeals' use of that term, rather than the broader term "damages."

23/ Contrary to petitioners' assertions, Petitioners' Brief at 22, the Court of Appeals did not order that reimbursement be awarded in this case; rather, it remanded the case to the District Court for consideration whether reimbursement

(footnote continued)

Court has no authority whatsoever to award tuition reimbursement to the parents since the EHA does not permit such relief.[24/] This narrow reading of the relief available to parents under the EHA is squarely at odds with the stat-

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(footnote continued)
is appropriate here, in light of the equitable criteria articulated by the Court of Appeals. Pet. App. 124a, 139a.

24/ Burlington apparently believes, nonetheless, that the EHA permits the District Court to order the parents to reimburse Burlington for the tuition it paid during the course of the judicial proceedings. Petitioners' Brief at 52. Certiorari has not been granted on this question. Therefore, the availability of reimbursement to a local educational agency, as opposed to the parents, is not before the Court in this case. To the extent that the issue of reimbursement to a local educational agency is at all pertinent here, the Department concurs in the Court of Appeals' even-handed approach; i.e., that reimbursement may be awarded to the prevailing party in appropriate circumstances, regardless of whether that party is the local educational agency or the parents.

ute's language, history, and purpose.25/

We begin first with the language of the statute which gives the district court jurisdiction to review the final state administrative decision and grant relief. American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982). The relevant portion of § 1415(e)(2) authorizes the district court to grant "such relief

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25/ Nor is it the prevailing view among the circuits. All of the courts that have considered the issue of reimbursement under the EHA have either held or suggested that, at least under some circumstances, tuition reimbursement is available to parents. See, e.g., Scokin v. State of Texas, 723 F.2d 432, 439 (5th Cir. 1984); Anderson v. Thompson, 658 F.2d 1205, 1213-14 (7th Cir. 1981); Department of Education v. Katherine D., 727 F.2d 809, 817 (9th Cir. 1983); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983); Smith v. Robinson, 104 S. Ct. 3457, 3473-74 n. 24 (1984).

as the court determines is appropriate." The Court of Appeals has interpreted this provision to permit the district court, in its discretion, to award tuition reimbursement where the facts and circumstances of a particular case warrant such an award. Pet. App. 137a.[26/]

The Court of Appeals' interpretation is entirely consistent with the ordinary meaning of the word "appropriate."[27/] In Hall v. Cole, 412 U.S. 1 (1973), this Court was called upon to interpret the phrase "such relief (including injunc-

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26/ The equitable remedy of reimbursement, unlike the remedy of attorney's fees requiring statutory authorization, see Smith v. Robinson, 104 S. Ct. at 3464, need not be expressly authorized by statute.

27/ See American Tobacco Co. v. Patterson, 456 U.S. at 68 (legislative purpose is expressed by the ordinary meaning of the word used).

tions) as may be appropriate." The Court equated the authority to grant appropriate relief with the authority to "grant relief according to the necessities of the case." Id. at 11 (citations and quotations omitted). Cf. Rowley, 458 U.S. at 198 (the use of the word "appropriate" to describe "education" in the EHA suggests a Congressional intent to assure an educational setting that is suitable to that particular child).[28/] The Court of Appeals' instruction that the district court examine the parties' conduct, consider the circumstances, and balance the equities in each case when considering a request for tuition reimbursement, reflects its understanding

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28/ Webster's Third New International Dictionary 106 (1964) similarly defines "appropriate" as "specially suitable."

that any relief awarded should be "specially suitable" to the individual case.29/

Where, as here, there is no express legislative prohibition of an award of tuition reimbursement to the parents,30/ the common, settled meaning

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29/ More generally, the language "appropriate relief" signifies a grant of equitable jurisdiction. Hall v. Cole, 412 U.S. at 13. Under a court's equitable jurisdiction, reimbursement for monies paid has been considered an available remedy. E.g., Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946) (the phrase "other order" allows, as an equitable remedy, an award of reimbursement for monies paid as rent).

30/ Nor is there any Eleventh Amendment bar to tuition reimbursement in this case, since relief is not sought against the state, and any relief awarded would not be paid out of the state treasury. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 400-02 (1979); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 280 (1977); Hyatt, Litigating the Rights of Handicapped Children

(footnote continued)

of the word "appropriate", i.e., tailored to the necessities of the each case, must govern.[31] Moreover, as shown below, the legislative history fully supports an interpretation that allows the district court the flexibility to award relief suitable to each case, including, where appropriate, tuition reimbursement.

That legislative history first demonstrates that judicial review is the final step in a series of procedural protections afforded to the parents of a handi-

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(footnote continued)
to an Appropriate Education: Procedures and Remedies, 29 U.C.L.A. L. Rev. 1, 59 (1981).

31/ NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.").

capped child under § 1415(e) of the EHA. Section 1415(e), as it now appears, was not included in the original House and Senate bills.[32/] Instead, the procedural safeguards, in their present form, were inserted by the Conference Committee as part of an effort to clarify and strengthen the administrative and judicial review provisions of existing law.[33/] S. Conf. Rep. at 48, reprinted in 1975 U.S. Code Cong. & Ad. News at 1501. The Senate Conference Report, com-

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32/ S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 47-50 (S. Conf. Rep.), reprinted in 1975 U.S. Code Cong. & Ad. News 1480, 1500-03.

33/ The Education Amendments of 1974, then in effect, simply provided that whatever administrative hearings were available would be "subject only to appropriate administrative or judicial appeal." Pub. L. No. 93-380, § 612, 88 Stat. 484 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 541, 660.

menting upon the relief available upon judicial review, simply states that the district court is authorized to "grant all appropriate relief." S. Conf. Rep. at 50, reprinted in 1975 U.S. Code Cong. & Ad. News at 1503. By using the word "all" to modify "appropriate relief," the drafters of the EHA evinced an intent to give the court the necessary flexibility to fashion an appropriate remedy. The use of such broad language certainly cannot be construed as a legislative command prohibiting tuition reimbursement.

The strongest evidence, however, of congressional intent to permit tuition reimbursement is found in the Senate Report, which discusses the role of the administrative and judicial proceedings in resolving financial disputes between

parents and a local education agency:

> If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under section [1415(e)] appl[y] (emphasis added).

S. Rep. No. 168, 94th Cong., 1st Sess. 32, reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1456. It defies logic to contend that Congress intended to require that the administrative and judicial proceedings be used to determine financial responsibility for a private school placement but, at the same time, to prohibit the district court from awarding relief in accordance with a

determination of financial responsibility.[34/]

Moreover, in many cases, a determination of financial responsibility is the only real issue for judicial determination. A decision by the district court that a proposed IEP is appropriate or inappropriate, without more, may often provide hollow relief, since by the time judicial review is completed the school year covered by the IEP in issue will

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34/ This interpretation is further supported by the regulations promulgated by the United States Department of Education implementing the EHA. These regulations incorporate the language of the Senate Report and provide that the "due process procedures" available to parents, which include an administrative hearing and judicial review, will be used to resolve the question of financial responsibility for a private school placement. 34 C.F.R. § 300.403. The construction of the EHA embodied in these regulations is entitled to deference. Irving Independent School District v. Tatro, 104 S. Ct. 3371, 3377 (1984).

ordinarily be over. Reimbursement to the prevailing party may provide the only meaningful remedy for the parents who paid for an appropriate private school placement or for the local educational agency who paid for an inappropriate placement during the interlude of litigation.

The Court of Appeals' construction of the term "appropriate relief" is not only consistent with the language and history of the judicial review provision, it also furthers the goals and purposes underlying the EHA.[35/]

The central purpose of the EHA is to provide an appropriate education to all

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35/ "As in all cases of statutory construction, [the Court's] task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979); accord Philbrook v. Glodgett, 421 U.S. 707, 713 (1975).

handicapped children at no cost to their parents. This goal dominates the statute. The EHA is designed to ensure that all handicapped children are afforded a "free appropriate public education." 20 U.S.C. § 1400(c).[36/] Free appropriate public education means "special education and related services . . . provided at public expense . . . and without charge." 20 U.S.C. § 1401(18)(emphasis added). Special education, in turn, is defined as "specially designed instruction, at no cost to parents." 20 U.S.C. § 1401(16)(emphasis added). See also 34

36/ The term "public education" includes education in private schools at public expense if the public school does not have appropriate special education available. See 20 U.S.C. §§ 1401(18), 1413(a)(4)(B); 34 C.F.R. §§ 300.400-300.452.

C.F.R. § 300.401(a)(2). Thus, the EHA contemplates an education that is both free and appropriate; it does not require parents to choose either a free or an appropriate education. Permitting retroactive reimbursement to parents who have been forced to send their child to a private school due to the failure of the local educational agency to propose an appropriate public school program ensures that the overriding objective of providing education that is both free and appropriate, is met.

To help carry out the goal of making an appropriate education available to the handicapped child at no cost to parents, the EHA provides financial assistance to states and local educational agencies "to relieve the fiscal burden placed [on them] by their responsibility

to provide education for all handicapped children." Smith v. Robinson, 104 S. Ct. at 3468 (citing 20 U.S.C. § 1400(b)(8) and (9)).[37/] The statute does not, however, have the purpose or effect of insulating local educational agencies from the financial burden of providing an appropriate education. Irving Independent School District v. Tatro, 104 S. Ct. at 3377 n. 8.[38/]

37/ Under the EHA, each participating state receives a certain percentage of the average nationwide per-pupil cost of educating a handicapped student multiplied by the number of handicapped students served in that state. Seventy-five percent of these funds (entitlement funds) are passed on to the local educational agencies serving the children. A state may treat the other 25% as discretionary funds. 20 U.S.C. § 1411(c).

38/ Nor, as Burlington apparently concedes, Petitioners' Brief at 23, are local educational agencies protected by the Eleventh Amendment. See n. 30, supra.

If a district court is not authorized to order the local educational agency to pay tuition costs for an appropriate private school placement under any set of circumstances, then "the school system has effectively transferred part of its contractual public obligation to a private party, in contravention of the statute's express primary directive." Brookline School Committee, 722 F.2d at 916.[39/] In contrast, awarding tuition reimbursement to the parents where the private school placement is later found to be appropriate simply imposes on the local school committee the costs it would

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39/ Under state law, it is the local educational agency that is required to bear the primary financial burden of providing an appropriate education for handicapped children. Mass. Gen. Laws Ann., ch. 71B, § 5 (West 1982); 603 C.M.R. 28, ¶¶ 202, 504.5.

have incurred had it made that placement initially. Reimbursement, therefore, only imposes those financial responsibilities contemplated by the EHA.[40/] "[F]or the successful parent to be left with what should have been the town's bill ab initio does not seem a municipal protection that Congress would have intended, however great the shortage of funds." Brookline School Committee, 722 F.2d at 921 (quoting Doe v. Anrig, 561 F. Supp. 121, 127 (D. Mass. 1983), aff'd Doe v. Anrig II, supra).

The availability of court-ordered tuition reimbursement creates an incentive for the local educational agency to

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40/ Cf. Smith v. Robinson, 104 S. Ct. at 3474 (attorney's fees which impose additional financial responsibilities are not authorized under the EHA).

ensure that the initial placement offered to the parents is appropriate, which in turn furthers the legislative goal of providing an appropriate education. It "reflects a sensible accomodation of the [local educational agency]'s interest in shaping the children's educational programs and the children's interest in receiving sufficient educational attention while those programs are being developed." Colin K. v. Schmidt, 715 F. 2d 1, 7-8 (1st Cir. 1984). Without any possibility of reimbursement a child may remain "mired in an inappropriate program while the appellate mechanism[41/] slowly determine[s] his fate," Blomstrom v.

41/ Here, the appellate mechanism began in 1979 and is still not completed.

Massachusetts Department of Education, 532 F. Supp. 707, 713 (D. Mass. 1982), thereby thwarting the express congressional intent.42/

Reimbursement also serves another purpose underlying the EHA, encouraging parental participation in educational decisions. As recognized by this Court, Congress chose to encourage parental involvement in developing educational plans "to assure that appropriate services are provided to a handicapped child."

42/ The Massachusetts Supreme Judicial Court, when addressing the appropriateness of reimbursement as a remedy under Mass. Gen. Laws Ann. ch. 71B, the state special education law, commented that "reimbursement places the parent and child precisely where they would have been had the school committee initially fulfilled its statutory obligation in evaluating the child." Amherst-Pelham Regional School District v. Department of Education, 376 Mass. 480, 493, 381 N.E.2d 922, 931 (1981).

Rowley, 358 U.S. at 208-09 (citing S. Rep. No. 168, 94th Cong., 1st Sess. 11-12, reprinted in 1975 U.S. Code Cong. & Ad. News at 1430); Smith v. Robinson, 104 S. Ct. at 3469. As illustrated by cases like this one, Congress correctly predicted that "parents . . . will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." Rowley, supra at 209. The availability of reimbursement permits such parental participation by allowing children the right to receive the education thought to be appropriate by his or her parents, the party normally responsible for such decisions, and encouraging parents "to be assiduous in protecting their child's rights . . . ." Brookline School Committee, 722 F.2d at 921. As a

result, the overall goal of providing an appropriate education is advanced.

In sum, the language, history, and purposes of the EHA demonstrate that Congress intended to allow a district court to order tuition reimbursement where the circumstances of the case warrant such an award. Without the availability of tuition reimbursement as a remedy, the Congressional goal of a free and appropriate education for all handicapped children would be frustrated.

B. The Guidelines Articulated By The Court of Appeals For Determining Whether Reimbursement Is Appropriate Are Consistent With The EHA As Properly Construed.

As stated earlier, the Court of Appeals ruled that retroactive reimbursement may be awarded to the prevailing

party. It is not an automatic remedy, however. Rather, the court cautioned the district court to balance the equities of the case when considering whether to award reimbursement. Pet. App. 137a. The Court of Appeals then articulated equitable factors which might preclude an award of reimbursement to the prevailing party.

Of foremost importance is the requirement that the district court carefully weigh the conduct and good faith of both the parents and the local educational agency throughout the development of the IEP and later proceedings. Pet. App. 133a, 137a, 138a. For example, on remand, the District Court must consider the BSEA's finding that Burlington com-

mitted substantive and procedural violations in the preparation of Michael's IEP. If the District Court finds that those transgressions constitute serious violations of state or federal law,[43] Burlington may be viewed as having acted in bad faith and, therefore, not entitled to reimbursement should it succeed in proving that its proposed IEP was appropriate. Pet. App. 138a. Conversely, if the parents, without justification,

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43/ Unlike Burlington (Petitioners' Brief at 30-31), we do not discuss the particular procedural violations asserted. These are issues yet to be adjudicated by the District Court. We simply note that Burlington's attempt to trivialize them (Petitioners' Brief at 29a) was squarely rejected by the Court of Appeals. "This court declines to rescue the plaintiff from its stance of stubborn indifference to and deprecation of its violations of [Michael's] procedural rights." Pet. App. 147a.

failed to cooperate in the development of the IEP, they may not be entitled to reimbursement, even if they succeed in establishing that the proposed IEP was inappropriate.

Placing this emphasis on the reasonableness of the parties' reciprocal conduct toward one another furthers the goals of the EHA. First, it fosters compliance with the procedural protections afforded under the EHA, so central to the goal of an appropriate education. As this Court stated in Rowley,

> [W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, as it did upon the measurement of the resulting IEP against a substantive standard.

458 U.S. at 205-06 (citation omitted). Therefore, a local educational agency's failure to provide the necessary procedural protections is relevant when considering a request for equitable relief under the EHA. Second, in order to meet the goals of the EHA, the parents and the local educational agency must work together year after year to develop the required annual IEPs. Where either party withholds that cooperation, such conduct ought to be relevant to the formulation of appropriate equitable relief.44/

The Court of Appeals also considered the effect of a state agency's decision in the parents' favor on the reviewing

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44/ Cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975) (party seeking back pay under Title VII may not be entitled to relief if its conduct has substantially and improperly prejudiced the other party).

court's determination of whether tuition reimbursement is appropriate. The Court of Appeals concluded that where the State educational agency finds a particular private placement appropriate and orders the child enrolled in that placement, it would simply be inequitable for a reviewing court to hold the parents responsible for funding that placement. The Court of Appeals therefore held that the parents in this case should not be held financially responsible for the tuition expenses incurred for the latter half of the 1979-80 school year, which it referred to as a "safe harbor" period. Pet. App. 136a.[45/] The Court of

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45/ Although the court did not expressly hold that the parents are entitled to reimbursement for the safe harbor period, it implied as much by holding that Burlington is not entitled to be reimbursed for any tuition paid by it during that

(footnote continued)

Appeals further recognized that by enforcing the state hearing officer's reimbursement order,[46] the court would be furthering the EHA's scheme of cooperative federalism elaborated in Rowley[47] by assisting the State educational agency

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(footnote continued)
period. In fact, Burlington paid no tuition for that period; therefore, if the parents are to be free of financial responsibility for that period, such a result could be accomplished only by requiring Burlington to reimburse them.

46/ The hearing officer in this case ordered Burlington to reimburse the parents for the 1979-80 school year. As recognized by the Court of Appeals, Massachusetts hearing officers have the authority under state law to order such tuition reimbursement. Amherst-Pelham Regional School Committee v. Department of Education, 376 Mass. at 492-93, 381 N.E.2d at 930-31 (1978); 603 C.M.R. 28, ¶ 504.5(f). However, whether a federal court has such authority under state law is immaterial to the single federal question presented by this case. See also n. 48, infra.

47/ Rowley, 458 U.S. at 207-09.

in its own enforcement efforts.[48/]

Finally, the Court of Appeals discussed the role of § 1415(e)(3) as it bears upon an equitable award of reimbursement. As we demonstrate in the

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48/ A different situation would be presented where, unlike here, a federal court attempted to enforce state law against a state. Such relief would be barred by the Eleventh Amendment. Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900, 911 (1984); Smith v. Robinson, 104 S. Ct. at 3464 n. 6; Ezratty v. Puerto Rico, 648 F.2d 770, 776-77 (1st Cir. 1981); Max M. v. Thompson, 585 F. Supp. 317, 332 n. 7 (N.D. Ill. 1984). Since, in this case no party alleges a violation of state law on the part of state officials and no relief is sought against the state, such Eleventh Amendment concerns are not presented. See Students of California School for the Blind v. Honig, 745 F.2d 582, 583-87 (9th Cir. 1984)(dissent from denial of rehearing en banc), petition for cert. filed, 53 U.S.L.W. 3243 (U.S. Sept. 17, 1984) (No. 84-436); St. Louis Developmental Disabilities Treatment Center Parents Association v. Mallory, 591 F. Supp. 1416, 1477 n. 95 (W.D. Mo. 1984); William S. v. Gill, 591 F. Supp. 422, 426 n. 7 (N.D. Ill. 1984).

following section, the Court of Appeals correctly concluded that § 1415(e)(3) does not govern the parents' ultimate right to seek relief under § 1415(e)(2). In sum, the criteria articulated by the Court of Appeals for determining whether tuition reimbursement would be appropriate relief is consistent with the EHA generally and, more particularly, with § 1415(e)(2).

II. THE PARENTS' ENROLLMENT OF THEIR HANDICAPPED CHILD IN AN APPROPRIATE PRIVATE SCHOOL, PENDING ADMINISTRATIVE AND JUDICIAL REVIEW, DOES NOT OPERATE AS A BAR TO REIMBURSEMENT UNDER § 1415(e)(2).

Burlington contends that even if the District Court is authorized to award tuition reimbursement under § 1415(e)(2), the parents have forfeited any right to

reimbursement by enrolling Michael in the Carroll School in September 1979. As support for this proposition, Burlington claims that the parents have "violated" § 1415(e)(3), the "interim placement" provision, and that a violation of § 1415(e)(3) automatically precludes tuition reimbursement. Petitioners' Brief at 37-44. The Court of Appeals rejected both arguments. The court's interpretation of § 1415(e)(3) generally and as applied to this case is correct.

A. By Placing Their Child In Private School Pending Appeal, The Parents Did Not Violate the Provisions of 20 U.S.C. § 1415(e)(3).

Once again we begin with the language of § 1415(e)(3), which is within that section of the EHA that sets forth the

procedural safeguards for parents of handicapped children. The provision provides in relevant part:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, . . . until all such proceedings have been completed.

Thus, absent agreement between the parents and the State or local educational agency, the child is to remain in his "current educational placement" until the conclusion of the administrative and judicial proceedings.

In this case, however, there was an agreement between the parents and Burlington that Michael should not remain in his "current educational placement." Although the parents and Burlington have disagreed on the appropriate special

education program for Michael, they did agree on one thing in the spring of 1979: Michael's regular class at the Memorial School was not adequate to meet his special education needs and his placement should be changed. J.A. 203-06, 316-18; Pet. App. 13a. Therefore, since Burlington and the parents "otherwise agree[d]" that Michael's "then current educational placement" would be changed, his change in placement did not violate § 1415(e)(3).[49/]

Not only did Burlington and the par-

49/ See, e.g., Zvi D. v. Ambach, 694 F.2d 904, 906 n. 4 (2d Cir. 1982) (the educational agency and the parent may agree to a change in placement); Monahan v. Nebraska, 491 F. Supp. 1074, 1089 (D. Neb. 1980), aff'd in part, vacated in part, 645 F.2d 592 (8th Cir. 1981) ("child had no 'then current educational placement' because all parties agreed the child could not remain in his previous educational setting").

ents agree that Michael should not remain in his "then current educational placement," but the State educational agency, acting through the BSEA, agreed with Michael's parents that Burlington's proposed IEP was inadequate and that he ought to be educated in the special education program offered by the Carroll School.[50/] Thus, even if there was no agreement with Burlington that Michael change placements, the use of the disjunctive "or" in the language of § 1415(e)(3) ("State or local educational agency") indicates that the statute allows a change in placement where the State, rather than the local educational

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50/ The Court of Appeals did not address whether there was an agreement between the State and the parents because it found that both Burlington and the parents agreed that Michael should not remain at the Memorial School. Pet. App. 132a.

agency, agrees with the parents on the child's placement.[51] In this case, after a lengthy hearing, the BSEA issued a decision which upheld the parents' position, i.e., that Michael belonged in the Carroll School for the 1979-80 school year. Accordingly, for purposes of § 1415(e)(3), the State and the parents have "otherwise agree[d]" that the appropriate placement for Michael's special education needs was at the Carroll School.

This interpretation of § 1415(e)(3) is also consistent with the purposes of the EHA. Indeed, it is difficult to

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51/ See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.").

imagine what congressional purpose could be served by interposing the wishes of the local educational agency when the State educational agency and the parents have agreed on the appropriate special education program for the student. Where Congress has placed primary responsibility upon the State educational agency for insuring that each handicapped child receives a free and appropriate special education, the determination of that agency ought to be implemented when it is reached in accordance with the procedural guarantees provided to parents under § 1415(e)(3). Since the Department and the parents agreed to Michael's placement at the Carroll School pending the resolution of Burlington's judicial appeal, no violation of § 1415(e)(3)

occurred here.

In order to avoid the obvious conclusion that § 1415(e)(3) has no applicability to this case and ignoring the plain meaning of the word "current", Burlington asserts that its proposed IEP, which called for a change to a separate special education class at the Pine Glen School, should be treated as the "then current educational placement" for purposes of § 1415(e)(3). Petitioners' Brief at 42. Burlington then claims that because there was no agreement to move Michael from this proposed placement, Michael's parents violated § 1415(e)(3) by enrolling him in the Carroll School. Yet Burlington's view that its proposed IEP was Michael's "current educational placement" defies common sense. As an initial matter, since Michael's parents

never accepted the proposed IEP, that IEP never went into effect and special education services could not have been provided.[52/] The most significant point, however, is that Michael never attended the Pine Glen School. Burlington's view of Michael's current educational placement is therefore inconsistent with the purpose of the provision, which is to ensure continuity in a child's education by preserving the status quo.[53/] Thus, since Michael has

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52/ Special education services will not be provided until an IEP is "in effect." 34 C.F.R. § 300.342. An IEP is not "in effect" unless and until it is regarded "by both the parents and the agency as appropriate." 34 C.F.R. Part 300, Appendix C, Notice of Interpretation, Q. 3.

53/ "Because of its belief that erroneous classifications [of handicapped children] were widespread, Congress determined that the interests of the handicapped child would be best served by

(footnote continued)

never attended the school proposed by the IEP, preservation of the status quo is not an issue. Accordingly, where all parties agreed that Michael should not remain at the Memorial School, his enrollment in the Carroll School did not contravene § 1415(e)(3).

B. Section 1415(e)(3) Does Not Govern The Availability Of Reimbursement.

Even if the private placement here could be viewed as contrary to the provisions of § 1415(e)(3), Burlington's view

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(footnote continued)
imposing the status quo upon placement pending the resolution of any parental complaints prompted by a proposed change in placement." Tilton v. Jefferson County Board of Education, 705 F.2d 800, 804 (6th Cir. 1983), cert. denied, 104 S. Ct. 998 (1984); see also Brookline School Committee, 722 F.2d at 918 (§ 1415(e)(3) "establishes a strong preference, but not a statutory duty, for maintenance of the status quo.").

of the effect of § 1415(e)(3) on the availability of relief under § 1415(e)(2) is not supported by the language, history, or purposes of § 1415(e)(3).

For purposes of Burlington's claim, § 1415(e)(3) is more notable for what it does not say. First, it says nothing regarding the consequences of parents' enrolling their child in a private school. Second, there is no mention of payment or reimbursement. Finally, the provision does not address the parents' right to relief at the conclusion of the judicial review proceedings. Thus, the language of § 1415(e)(3) fails to provide any support for Burlington's claim that the parents' enrollment of Michael in the Carroll School, while they were pursuing their administrative and judicial

remedies, constitutes an absolute bar to their ultimate right to reimbursement under § 1415(e)(2).

The history and purpose of § 1415(e)(3) demonstrates that it was intended as a protection for children against unilateral actions by school officials who had previously assigned or reassigned handicapped children to educational programs or, indeed, removed students from school without notifying parents or according them an opportunity to challenge that reassignment or removal.

Section 1415(e)(3) did not appear in any form in either the original House or Senate bills; it was added by the Conference Committee.[54/] The interim placement language inserted by the Conference

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54/ S. Conf. Rep. at 50, reprinted in 1975 U.S. Code Cong. & Ad. News at 1503.

Committee originated in two 1972 district court decisions "which, to a significant extent, guided the drafters of the Act." Rowley, 458 U.S. at 194.[55/] The Mills and PARC cases arose primarily because handicapped children were often excluded entirely, expelled, suspended, or reassigned from regular classes without notice and an opportunity to be heard. Mills, 348 F. Supp. at 868; PARC, 343 F. Supp. at 282. In both cases the district court established, in addition to the substantive right to an appropriate education, extensive notice and hearing rights for parents of handicapped chil-

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55/ Pennsylvania Association for Retarded Children v. Pennsylvania (PARC), 343 F. Supp. 279 (E.D.Pa. 1972); Mills v. Board of Education (Mills), 348 F. Supp. 866 (D.D.C. 1972).

dren prior to a change of placement. Included within the procedural protections afforded to parents was the requirement that, except in extraordinary circumstances, there shall be no change in the child's regular educational placement until the completion of the hearing procedures.[56/]

By incorporating the parents' procedural rights set out in PARC and Mills, including the child's right to remain in the existing placement, into the EHA's

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56/ Mills provides, for example:

> Pending the hearing and receipt of notification of the decision, there shall be no change in the child's educational placement unless the principal (responsible to the Superintendent) shall warrant that the continued presence of the child in his current program would endanger the physical well-being of himself or others. 348 F. Supp. at 882.

section providing safeguards for parents, Congress made clear that it intended § 1415(e)(3) to operate as a protection for handicapped children and their parents against adverse action by public school officials. The United States Department of Education has accordingly interpreted § 1415(e)(3) to bar interim changes in placement actions by the educational agency. 34 C.F.R. Part 300, Appendix C, Notice of Interpretation, Q. 35. This administrative interpretation is entitled to "great deference." Udall v. Tallman, 380 U.S. 1, 16 (1965); United States v. Larionoff, 431 U.S. 864, 872 (1977).[57/] To interpret this

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57/ See also Tokarcik v. Forest Hills School District, 665 F.2d 443, 453 (3rd Cir. 1981), cert. denied, 458 U.S. 1121 (1982) ("the 'stay put' provision insures that a school cannot eject a child without complying with due process require-

(footnote continued)

section, which was intended to protect parents and children from precipitous actions by local educational agencies, as a bar to equitable relief to parents is directly contrary to Congress' intent.

The only floor discussion pertinent to § 1415(e)(3) stresses the flexible nature of the provision as a means of avoiding unnecessary delays in placements:

> The conferees are cognizant that an impartial due process hearing may be required to assure that the rights of the child are completely protected. We did feel, however, that the placement, or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus the conference adopted a flexible approach to try to meet the needs of both the child and the state.

(footnote continued)
ments"); Cox v. Brown, 498 F. Supp. 823, 827 (D.D.C. 1980)("Section 1415(e)(3) is part of the due process section of the EHA granting a panoply of rights to children and their parents").

121 Cong. Rec. 37,412 (1975) (remarks of Sen. Stafford). The importance to a handicapped child's development of avoiding unnecessary delays and insuring prompt implementation of appropriate placements appears throughout the legislative history. As one sponsor of the EHA stated:

> In addition, I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development.

121 Cong. Rec. 37,416 (1975)(remarks of Sen. Williams).

The availability of tuition reimbursement facilitates prompt implementation of appropriate placements. On the one hand, local educational agencies have a greater incentive to propose appropri-

ate placements initially if they are held financially responsible for the appropriate placement. On the other hand, the potential for reimbursement from the local educational agency encourages parents to be assiduous in protecting their child's rights. Brookline School Committee, 722 F.2d at 920-21.[58/]

Burlington's position that § 1415(e)(3) requires parents to keep their child in an arguably inappropriate placement or later forfeit reimbursement is inconsistent with the statute's goal of providing handicapped children with a free and appropriate education. In this case, for example, if the parents had

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58/ The Court of Appeals also recognized that the possibility of having to repay the local educational agency for a change to private school would militate against impulsive or unfounded actions on the part of the parents. Id.

not placed Michael in the Carroll School pending appeal, he would have had to remain in either the Memorial School (his last educational placement) or the Pine Glen School (Burlington's proposed educational placement) from the fourth grade (1979-80) at least through the ninth grade (1984-85) and possibly longer depending upon when the judicial proceedings in this case are completed. Assuming that on remand the District Court determines that Michael's appropriate educational placement is at a private school specializing in learning disabilities, Michael would have spent at least six years in an inappropriate educational setting if his parents had not placed him in a private school. As the Court of Appeals recognized, interpreting § 1415(e)(3) as requiring a handicapped

child to remain in an arguably inappropriate placement "treats these special needs students as though they were nonperishable commodities able to be warehoused until the termination of in rem proceedings." Pet. App. 130a. The drafters of the EHA, who hailed the statute as a giant step forward in their efforts to meet the needs of approximately eight million handicapped children,[59] could not possibly have intended such a result.[60]

Rather than leave their child in what they believed to be an inappropriate

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59/ See 121 Cong. Rec. 37,410 (1975).

60/ Interpretation of the language of § 1415(e)(3) as mandatory, rather than directory, is not only inconsistent with the purposes of the EHA, it would result in an interference with a parent's right to make educational choices for his or her child. Anderson, 658 F.2d at 1209.

placement, the parents chose to enroll him in a private school. If it is determined on remand that the private school placement was the appropriate choice, a rule barring tuition reimbursement would mean that Michael will have received an education that was appropriate, but not free. Such a result would also be contrary to Congressional intent.

Although, for the reasons just discussed, § 1415(e)(3) cannot properly be construed as an absolute bar to tuition reimbursement, in some cases the parents' unilateral removal of their child from public school may be relevant to their right to equitable relief under § 1415(e)(2). However, this is not such a case. The parents have neither failed to cooperate in the development of the

IEP nor ignored the administrative procedures set forth in the EHA.[61/] Here, the parents cooperated with school officials for over three years in an effort to secure appropriate educational placements for Michael. J.A. 50-85. Only after they were advised repeatedly by a pediatric neurologist that their child had a severe learning disability, and needed immediate specialized attention not available in the public school, did

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61/ Burlington relies on Stemple v. Board of Education, 623 F.2d 893 (4th Cir. 1980), cert. denied, 450 U.S. 911 (1981), which held that parents who unilaterally place their child in a private school cannot recover the tuition costs thus incurred. Id. at 897. Cf. also Stacey G. v. Pasadena Independent School District, 695 F.2d 949, 951-52 (5th Cir. 1983). In Stemple and Stacey G., unlike here, the parents did not claim an administrative appeal until their child had been in a private placement for a year or more. Moreover, in Stemple, unlike here, the State found the public, not the private, school to be the appropriate educational placement.

they exercise their right to reject Burlington's proposed IEP and initiate the due process procedures set forth in § 1415. J.A. 26, 30, 31. Furthermore, prior to the administrative hearing the parents participated in mediation sessions conducted by the BSEA seeking to resolve the dispute over Michael's appropriate placement. J.A. 32-34. Finally, they timely pursued their administrative appeal which resulted in a determination by the Department that Michael required the special education program provided by the Carroll School. Pet. App. 1a-27a. Thus, the EHA's requirement that parents utilize the due process procedures created by the statute as the mechanism for resolving disputes concerning appropriate

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education have been met. There is therefore no equitable ground for denying reimbursement as "appropriate relief" under § 1415(e)(2) because of the parents' enrollment of Michael in the Carroll School.

In sum, the parents' enrollment of their child in a private school was not contrary to the "interim placement" provision since the parents, Burlington, and the Department agreed that Michael should not remain in his "then current educational placement." Even if there was no agreement, however, that provision does not bar an award of equitable relief under § 1415(e)(2).

CONCLUSION

For the foregoing reasons, the Respondent Department of Education requests this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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Date: February 15, 1985

APPENDIX

20 U.S.C. § 1401. Definitions

As used in this chapter-

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

* * * *

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which dis-

order may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home

instruction, and instruction in hospitals and institutions.

* * * *

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in

any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and

evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1415. Procedural safeguards

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

* * * *

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decisions made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a

civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain

in the then current educational placement of such child, or, if applying for initial admission to a public school, shall with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

34 C.F.R. § 300.403 Placement of children by parents

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's

education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 300.450-300.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 300.500-300.514 of Subpart E.

603 Code of Massachusetts Regulations 28

¶ 504.5(f) If a child's parent enrolled the child in a Division-approved private day school or residential school program and appealed the child's IEP to the Bureau of Special Education Appeals or the SAC under Chapter 4, and the

Bureau of Special Education Appeals or the SAC determines that the IEP developed by the school committee is inadequate and the parent's choice of placement is appropriate, the school committee shall pay the full cost of instruction and support actually rendered or furnished to such child by the private school, retroactive to the date the inadequate IEP was rejected by the parent or could reasonably have been expected by the parent. The school committee shall enter into an agreement or contract with the private school, and shall report to the appropriate Regional Branch Office of the Division that the placement has been made.

MOTION FILED
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No.84-433

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS

Petitioners

CORRECTED COPY

v.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO a/k/a/ JOHN DOE, Sr., as he is next friend of Michael Panico a/k/a JOHN DOE, Jr.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE FOR THE DEVELOPMENTAL DISABILITIES LAW CENTER, CENTER FOR LAW AND EDUCATION, MASSACHUSETTS ADVOCACY CENTER, FEDERATION FOR CHILDREN WITH SPECIAL NEEDS, ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES, EPILEPSY FOUNDATION OF AMERICA, NATIONAL SOCIETY FOR CHILDREN AND ADULTS WITH AUTISM, AND THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS Petitioners v. DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO a/k/a/ JOHN DOE SR., as he is next friend of MICHAEL PANICO, a/k/a/ JOHN DOE,JR. Respondents	No.84-433

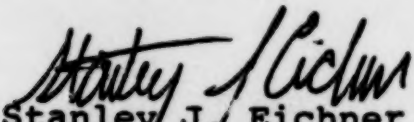
MOTION FOR LEAVE TO
FILE BRIEF, AMICUS CURIAE

The Developmental Disabilities Law Center, Center for Law and Education, Massachusetts Advocacy Center, Federation of Children With Special Needs, Association for Children and Adults with Learning Disabilities, Epilepsy Foundation of America, Association for Persons With Severe Handicaps, and the National Society

for Children and Adults With Autism respectfully move this Court for leave to file the accompanying brief amicus curiae. These organizations have had extensive involvement with the enactment and implementation of the Education of All Handicapped Children Act and various state special education statutes.

Amici believe that the Court would benefit from the arguments of these organizations which have a broader perspective than the parties herein and extensive practical experience in the implementation of the EAHCA. These organizations' proposed amicus brief is intended to be filed in support of respondents in this case who have consented to the filing of this brief and whose consent is being filed herewith. Petitioners have declined to consent.

Respectfully submitted,



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SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,

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Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE

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STATEMENT OF INTERESTS

The Developmental Disabilities Law Center, Inc. (DDLC) is a private, non-profit organization established and funded pursuant to 42 U.S.C.§§6000 et seq. 6012 ("D.D. ACT") to protect and advocate for the rights and interests of developmentally disabled persons in Massachusetts. DDLC has represented numerous parents and children in cases involving the application of state and federal special education statutes in administrative and judicial proceedings. The Massachusetts Department of Social Services has contracted with DDLC to provide representation for developmentally disabled children. As a result of this contract, DDLC has made attention to special education issues one of the highest priorities of the agency.

The Center for Law and Education, Inc. serves as the national support center on education issues for the legal services pro-

gram. It is primarily funded by the Legal Services Corporation, Washington, D.C. to provide assistance to local legal services programs and other attorneys representing low-income clients in litigation involving education issues. Since the enactment of the Education of the Handicapped Act, 20 U.S.C. §1401 et seq., the Center has been actively engaged in interpreting its regulatory provisions and otherwise seeking full implementation of the rights of disabled students. The Center has published an extensive manual, Special Education: Guidelines for Advocates, draft edition 1980, revised 1982; articles, including "Discipline of Handicapped Students;" and articles in Clearinghouse Review concerning the status of special education law. The Center has and is currently serving as co-counsel in actions raising claims under the EAHCA, and has also participated as amicus curiae in a number of cases before the federal appellate courts.

The Massachusetts Advocacy Center is a sixteen year-old private, nonprofit organization exclusively concerned about children throughout the Commonwealth of Massachusetts who may be excluded from school or from services to which they are entitled. The Center has litigated dozens of administrative appeals and numerous state and federal court actions on behalf of the families of handicapped children entitled to services under the Education for All Handicapped Children Act (P.L.94-142, 20 U.S.C. §1401 et seq.). The Center was asked to testify before a committee of the Congress on the status of implementation of P.L.94-142, and has also testified before a committee of the Massachusetts Legislature and before the Massachusetts Board of Education on the same subject. Employees of the Center are lawyers, educators, and social workers knowledgeable about the needs of handicapped students.

The Federation for Children With Special Needs is a not-for-profit, tax-exempt organization which is a center for parents of handicapped children and parent organizations working together to assist handicapped children and their families in securing appropriate services. The Federation's Board of Directors is composed of the following associations which collectively have approximately 15,000 members and represent the interests of over 100,000 handicapped children and their families: Children in Hospitals, Massachusetts Association for Children With Learning Disabilities, Massachusetts Association for Retarded Citizens, Massachusetts Parents Association for Deaf and Hard of Hearing, Massachusetts Parents Association of Deaf-Blind Children, Massachusetts Spina Bifida Association, National Society for Autistic Children (Mass.Chapter), New England Parent Association for Visually

Handicapped Children and Adults, Parents and Children Together, and Tuberous Sclerosis Association of America (Mass.Chapter).

The Association for Children and Adults With Learning Disabilities (ACLD) is a volunteer association with over 60,000 members in 800 chapters in the 50 states and the District of Columbia. The membership is composed of learning disabled individuals, parents of the learning disabled, and professionals from fields such as education and psychology who work with learning disabled people. According to the United States Department of Education, learning disabled students comprise the largest group of handicapped children in the United States. ACLD's paramount purpose is promoting the education and welfare of those with learning disabilities.

The Epilelpsy Foundation of America (EFA) is the only national, charitable, non-profit voluntary agency in the United

States specifically dedicated to the welfare of children and adults with epilepsy. Founded in 1968, EFA currently has over 8000 members and approximately 80 state and local affiliates throughout the country. The foundation has a longstanding commitment to secure the legal rights of persons with epilepsy and to otherwise improve the lives of the two million Americans with the condition. It seeks to do this through research, vocational programs, public information and education, professional education and advocacy.

The National Society for Children and Adults with Autism (NSAC) is the only national volunteer organization devoted solely to the well being of individuals with autism. NSAC is committed to eliminate this disorder through research, public and professional education, and development of habilitative services. The organization was founded in 1965 and was incorporated in Washington, D.C. on December 28,1968. It

is a national membership organization of parents and individuals concerned with autism. NSAC maintains a community-based network of 175 chapters and state societies with 6,000 members nationwide. The organization is governed by a national board of 17 directors elected by the general membership, complemented by a Professional Advisory Board composed of scientific investigators, educators and experts in research disciplines relevant to autism.

The Association for Persons with Severe Handicaps (formerly the American Association for the Education of the Severely/Profoundly Handicapped) was founded in 1974 to develop, advocate and implement the provision of educational and habilitative services for severely and profoundly handicapped individuals guaranteed to them through the Education of All Handicapped Children Act, 20 U.S.C. §1401 et seq. and related federal laws.

TASH has more than five thousand members who include parents, educators, therapists, doctors, and other professionals. TASH members work on a daily basis in schools, and community programs to reverse historic patterns of segregation and exclusion and to see to it that severely disabled people are included in the national life. One of TASH's stated objectives is the "rapid termination of living environments and educational/vocational/recreation services that segregate, regiment and isolate persons from the individualized attention and sustained normalized community interactions necessary for maximal growth, development, and the enjoyment of life."

All of the above organizations have been deeply involved in the passage and implementation of state and federal laws for the handicapped, including most notably for purposes of the present case, P.L. 94-142 and its state analogues. They are

participating here as amici curiae because of their concern that a decision adverse to the respondents would severely impair the ability of many parents of handicapped children to protect the interests of their children during lengthy due process proceedings and would effectively render useless to those parents the extensive procedural system mandated by P.L.94-142 and affirmed by the decision of this Court in Board of Education v. Rowley, 458 U.S.176 (1982).

STATEMENT OF FACTS

The amici adopt the statement of facts presented by the Respondents.

SUMMARY OF ARGUMENT

This case presents important questions regarding the role of parents in the education of handicapped students and the scope of judicial authority to enforce the Education of All Handicapped Children Act (EAHCA). Amici point out that Congress enacted the EAHCA to protect the equal protection rights of handicapped children and that the assuring of appropriate education for handicapped children was the primary and underlying purpose of the Act. The principal consideration in understanding the statutory scheme and in interpreting specific provisions of the EAHCA should be the Congressional intent of assuring appropriate education.

Interpreting 20 U.S.C. §1415(e)(3), the "status quo" provision of the EAHCA, as an absolute prohibition against changing a handicapped child's program during appeal

proceedings would be inconsistent with the appropriate education goal of the Act and a misreading of the statutory scheme. In enacting Section 1415(e)(3), Congress intended to prevent exclusion of handicapped children from school or retaliation for use of the Act's procedural protections. Congress did not intend to enter the constitutionally sensitive area of parent-child relations and to prohibit a parent's decision to place a child, handicapped or not, in a private school for which the parent was unable to pay. A determination of whether parents may be able to receive reimbursement for tuition payments is properly analyzed under another provision, Section 1412(e)(2). Furthermore, by enacting Section 1415(e)(3), Congress did not intend to eliminate the equitable powers of the courts to issue preliminary injunctive relief during special education proceedings

in circumstances when a parent could show likelihood of success on the merits and irreparable harm if temporary injunctive relief were not given.

The primary flaw in petitioner's argument and the analysis by some of the courts which have considered the scope of relief under 20 U.S.C. §1415(e)(2) is they pose the question as whether or not "damages" are available. The authority to "grant" such relief as the court determines is appropriate" provided by Section 1415(e)(2) is more appropriately analyzed as a grant of "equitable" authority which should be interpreted flexibly to allow the courts to further the Congressional objectives of the EAHCA. Decisions of this Court make clear equitable relief traditionally includes "restitution" necessary to make an injured party whole. Restitution in the form of reimbursement of tuition expenses is an appropriate element of equitable

relief in an EAHCA case and furthers the goals of the Act. A restitution remedy would not place a burden on school departments any greater than that intended by Congress and would serve the purpose of placing prevailing parents in the position they would have been in had education officials met their EAHCA obligations from the beginning.

ARGUMENT

I. THE PURPOSE OF THE EACHA WAS TO VINDICATE THE EQUAL PROTECTION RIGHTS OF HANDICAPPED CHILDREN BY ASSURING THAT THEY RECEIVE A FREE APPROPRIATE EDUCATION.

Recognizing that "for years handicapped children of this country have been kept in the dark, deprived of a free,full public education" 121 Cong.Rec.H37027 (daily ed., Nov.18,1975)(remarks of Rep.Gude), Congress enacted the Education for All Handicapped Children Act, 20 U.S.C. §1400 et seq. [hereinafter EAHCA] because the rights of disabled children were not being adequately protected by the states and local school districts. The Act's intent was to ensure for handicapped children the "educational opportunity that has been long considered the right of every other American child." 121 Cong.Rec. S20427 (daily ed.,Nov.19,1975)(remarks of Sen.Randolph). From the legislative history of the EAHCA, it is clear that Congress acted in responds to a number of judicial

decisions[1] that recognized the rights of handicapped children to equal educational opportunity under the Fourteenth Amendment of the U.S. Constitution.[2] The EAHCA not only "guaranteed them a right to education but. . .[provided] adequate provisions which will protect those rights and guarantee that a child will not be improperly labeled or improperly placed in an educational setting which will not suit his or her unique educational needs."121 Cong.Rec.H37026

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[1] See Pennsylvania Association for Retarded Citizens v. Pennsylvania, 343 F.Supp.279 (E.D.Pa.,1972), modifying 334 F.Supp.1257)(E.D.Pa.1971)(all mentally retarded persons are capable of benefitting from a program of education and training); Mills v. Board of Education, 348 F.Supp.866 (D.D.C.1972) (available funds must be expended equitably so that no child is excluded from a publicly-supported education consistent with his need and ability to benefit therefrom).

[2] See S.Rep.No.168, 94th Cong., 1st Sess., (hereinafter "S.Rep.") 5-7, 13, 17, 22-24, reported in 1975 U.S.Code Cong.& Admin.News 1425, 1429-31, 1433, 1437, 1440-41, 1446-48.

(daily ed.,Nov.18,1975)(remarks of Rep.Quie). Prior to the landmark cases[3] preceding Congressional involvement, the history of handicapped children had been one of institutionalization and arbitrary exclusion. Handicapped children had been excluded from the public schools on the theory that they could not benefit from educational programs. In its findings, Congress noted in the preamble to the EAHCA that there were more than 8 million children in the United States, more than half of whom were not receiving appropriate educational services and more than one million of whom were excluded entirely from the public school system.[4] Accordingly, Congress found it "in the national interest that the Federal Government assist state and

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[3] See note 1, supra.

[4] Act of Nov.29,1975, Pub.L.No.94-142, §§3(b)(1)(3)(4), 89 Stat.774 (Congressional statements and declarations), see 20 U.S.C. §1400 for further findings.

local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." 20 U.S.C. §1400(b)(9).

As a condition of receipt of federal financial assistance under the EAHCA the state educational agency must insure that all handicapped school-aged persons receive all rights mandated by the EAHCA, including their right to a "free appropriate public education." 20 U.S.C. §1412(1), 1414(a)(C)(ii), 34 C.F.R. 300.2, 300.121. The policy for provision of an appropriate education must be reflected in the state plan submitted to and approved by the Commissioner of Education. 20 U.S.C. §§1412, 1413. Education is to be made available to children in private as well as public schools "at no cost to their parents or guardian." 20 U.S.C. §§1401(18)(A), 1413(a)(4)(B)(i); 34 C.F.R. 300.4(a), 300.14, 300.401. The

Act also requires that the free appropriate public education be tailored to the unique needs of the handicapped child by means of an individualized education program (IEP). 20 U.S.C.§§1401(19), 1414(a)(5); 34 C.F.R. 300.340-300.349.

It is clear from the legislative history that the primary underlying purpose of the EAHCA was to assure appropriate services for handicapped children. See, e.g., S.Rep.16, 1975 U.S.Code Cong.& Admin. News 1440. The structure of the Act and legislative history show that Congress incorporated into the Act related policies, all of which are meant to assure implementation of the ultimate goal - an appropriate education for handicapped children.

For example, the heavy emphasis on procedural protections including parental participation, evidence a congressional policy that parents play a major role in

the decision-making process. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S.176, 205 (1982). As this court found in Rowley, the substantial parent participation requirements of the Act were intended to insure that appropriate education services are provided to handicapped children. Id., at 209.

Another example is the "mainstreaming" policy enunciated in the Act. See 20 U.S.C. §1415(5)(B). While petitioners imply this as preference of public school placement over private school placements designed to save money, this reading is belied by the statutory language and by the legislative history. The Act requires that to the maximum extent appropriate, handicapped children, including those in private facilities, be educated with nondisabled children. 20 U.S.C. §1412(5). The legislative history confirms that the Congressional concern,

represented by the mainsteaming policy, was not to protect the school treasury,but to assure that handicapped children, wherever they receive educational services, receive them as much as possible along side of non-handicapped children. See S.Rep.8, U.S. Code Cong.& Admin.News 1433; S.Conf.Rep. 94-455, 1st Sess.(hereinafter "S.Conf.Rep.") 30, reported in 1975 U.S.Code Cong. & Admin. News, 1483. Congress was adopting the lesson of the Mills case that the harm of segregation in education programs, forbidden for racial minorities by this Court in Brown v Board of Education, 347 U.S.483 (1954), was also constitutionally unacceptable for handicapped children. Mills, supra, 348 F.Supp. at 875. By requiring integration of handicapped children to the maximum extent feasible, whether in public or private programs, Congress intended that handicapped children have the opportunity to interact with and to learn from nonhandicapped students so

that these children with special needs could "increase their independence" and "become productive citizens." See S.Rep. 9,U.S.Code Cong.& Admin.News, 1433. Viewed in this perspective, the "mainsteaming" requirement becomes part of, not at odds with, the "appropriateness" requirement and allows a more coherent view of how these policies are to work together.

A final example of related policies is the policy of minimizing unnecessary disruption represented by the "status quo" provisions of 20 U.S.C. §1415(e)(3). See discussion infra. As we discuss in part II of this brief, preventing unnecessary disruption was only one of the means that Congress employed to address the "evil" of exclusion and to prevent retaliation for use of the appeals process. The overall legislative goal was assuring appropriate services.

In each example, parental participation, mainsteaming, and nondisruption, identifiable Congressional policies in the EAHCA can be interpreted in a wide variety of ways standing alone. However, when viewed as elements of and contributors to the overall Congressional policy of assuring appropriate educational services for handicapped children, the choices of interpretation are substantially reduced. This Court should be very suspicious of any proposed interpretation of EAHCA policies or provisions that do not relate directly to the underlying goal of assuring appropriate education. With this in mind, we urge this Court to uphold the decision of the Court of Appeals below on the issues accepted by this Court for review.

II. SECTION 1415(e)(3) OF THE EAHCA IS NOT A BAR TO PARENTAL REMOVAL OF A CHILD FROM A PUBLIC SCHOOL PROGRAM

Amici believe that in enacting Section 1415(e)(3), Congress intended to prevent education authorities from excluding or retaliating against handicapped students or unnecessarily disrupting an educational program during the statutory appeals process and did not intend to displace the traditional parental authority to choose to place their children in private schools. See Town of Burlington, supra, 736 F.2d 773 (1st Cir.1984). See also Parham v. J.R., 442 U.S.584, 602 (1979); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972). Section 1415(e)(3) is simply irrelevant to a parent's decision to move their child, handicapped or otherwise, to a private school program which the parents are willing to pay for themselves. Furthermore, even if review of Section 1415(e)(3) was relevant, state administrative hearing officers and

and federal trial court judges are not barred by section 1415(e)(3) from allowing a change in public funded placements in certain limited circumstances.

A. Congress intended 20 U.S.C. §1415(e)(3) to prevent exclusion or retaliation by local school officials and to prevent unnecessary disruption of a child's educational program during appeal proceedings.

The key to enforcing any individual disabled child's right to a free appropriate public education is found in student and parent involvement guaranteed by the procedural protections of the EAHCA, 20 U.S.C. §1415. As this Court recognized in Board of Education v. Rowley, parent involvement is critical to the successful implementation of the Act. 458 U.S. at 208-209. Effec-

tuating the right to a free appropriate education depends to a significant degree on the ardor with which parents pursue their children's rights. Id., at 208. The Act grants parents full access to examine all records relating to their child's evaluation and educational placement, 20 U.S.C. §1412 (2)(D); 34 C.F.R. 300.562, the right to written notice before the school district initiates, changes, or refuses to initiate or change a child's education program. 20 U.S.C. §1415(b)(1)(C),(D); 34 C.F.R. 300.504-300.505. Moreover, if the child's parents are unknown or unavailable, the state must name a "surrogate parent" to take on the parental role of protecting the child's rights. 20 U.S.C. §1415(b)(1)(B); 34 C.F.R. 300.514.

Throughout the due process proceedings, the child is protected by Section 1415 (e)(3). This section states:

> During the pendency of any proceedings conducted pursuant to this section, [section 1415] unless the state or local education agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

Section 1415(e)(3), sometimes referred to as the "stay put" or "status quo" provision is an integral part of the due process rights provided by the EAHCA to protect disabled children and their parents. Stuart v. Nappi, 443 F.Supp.1235 (D.Conn.1978). Enactment of this provision reflects Congressional awareness of the need in circumstances where a child is not suffering irreparable harm in the current placement to have an orderly system for meeting the child's needs during the appeal process. Because the Act is designed to provide each disabled child a free appropriate public

education through the joint process of school personnel and parents developing an individual education program, disagreements necessarily occur. As designed, Section 1415 (e)(3) protects children from becoming pawns in any dispute and from any retaliatory action by local school authorities. Cox v. Brown, 498 F.Supp.823 (D.D.C.1980). By thus preventing interruption and the concomitant risk of a setback in the child's development,[5] Section 1415(e)(3) seeks to minimize any detrimental effect of delay in resolving whatever issue is in dispute. Tokarcik v. Forest Hills School District, 665 F.2d (3rd Cir.1981)(court relied upon §1415 (e)(3) to undercut state's argument as to

[5] Interruption of a disabled child's educational program may lead to a regression of that child's learning abilities. Armstrong v. Kline, 476 F.Supp. 583, 592-94 (E.D.Pa.1979), aff'd in part sub nom Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3rd Cir.1980), cert. denied, 452 U.S.968 (1981); Georgia Association of Retarded Citizens v. McDaniel, 511 F.Supp.1263, 1272-73 (N.D.Ga.1981), aff'd, 716 F.2d 1565 (11th Cir.1983) vacated and remanded 104 S.Ct.3371 (1984) on remand 740 F.2d 902 (11th Cir.1984).

the need to apply a limited 30 day state appeals period to claims under EAHCA).

However, there is no evidence that Congress intended Section 1415(e)(3) to displace traditional parent choice to place a child in a private school. 20 U.S.C. §1413(a)(4)(B); 34 C.F.R.300.401, 300.403 and comments thereto. The Fourth Circuit's assertion that Section 1415(e)(3) should be "taken literally" to prevent parents from obtaining a private school education for their children, Stemple v. Board of Education, 623 F.2d 893, 897-98 (4th Cir.1980), cert. denied, 450 U.S.911(1980) "did not rely on either the Act's legislative history or the structure and purposes of the Act as a whole," Burlington, supra, 736 F.2d at 797[6] nor did it take into account the place of

[6]The Seventh Circuit found the Stemple reading of Section 1415(e)(3) to be unpersuasive since they were "certain that parents have the right to move their handicapped children to private schools." Anderson v. Thompson, 658 F.2d 1205, 1209 (7th Cir.1981).

parental decision in our system of government. See Parham, supra, 442 U.S. at 602. ("Our constitutional system long ago rejected any notion that a child is the mere creature of the state and on the contrary, asserted that parents generally have the right coupled with the high duty to recognize and prepare [their children] for additional duties.") Quoting, in part, Pierce v. Society of Sisters, supra, 268 U.S.at 535. It is simply inconceivable that Congress without being substantially more explicit intended to enter this sensitive area to prohibit the parent of a handicapped child from doing what the parent of a nondisabled child can do, i.e., choose to pay for a private school program.[7] Such a rigid

[7] Whether the parent can be later reimbursed for that program in some circumstances is an entirely separate question which is properly resolved by an analysis of 20 U.S.C. §1415(e)(2). See discussion, infra; Anderson, supra, 685 F.2d at 1209.

absolutist reading "treats special needs students as though they were commodities able to be warehoused until the termination of in rem proceedings." Burlington, supra, 736 F.2d at 798, and is inconsistent with the central goal of the Act.

> We do not believe that Congress intended to freeze an arguably inappropriate program for the three to five years of review proceedings. To construe (e)(3) in this manner would thwart the express central goal of the Act; provision of a free appropriate education to disabled children. §1412(1)(emphasis added). Doe v. Brookline, 722 F.2d 910, 918 (1st Cir.1983)

The circumstances of the case at bar provide an excellent example of why Stemple's "literal" reading cannot stand. At the time the dispute arose, the child was in a program that all parties agreed was inappropriate; the only question was to which new program should the child be moved. See Burlington, supra, 736 F.2d at 799. Congress did not intend

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any handicapped child to remain in such a placement for more than 6 years of review proceedings.

When a school system cannot provide an appropriate education for a disabled child within the public schools, the EAHCA expressly authorizes a private placement which must be without cost to the parent. 20 U.S.C. §1413(a)(4)(B). If the child who is placed by his parents in a private placement has available a free appropriate public education, the public agency is not required to pay for the child's private educational placement. 34 C.F.R. §300.403(a). Disagreements between the parent and the public agency concerning the availability of an appropriate program for the child and the question of financial responsibility are subject to due process proceedings

under the Act. 34 C.F.R.300.403(b). The parents-respondents here properly initiated administrative due process proceedings. During the pendency of those proceedings, they placed their son in a private placement and assumed the risk of financial loss based on a belief that they would be vindicated. Section 1415(e)(3) is not at issue and cannot be used to bar parents seeking to exercise their rights under Section 1415(b) and (e).

B. Even if review of Section 1415(e)(3) of the EAHCA were at issue, preliminary injunctive relief is available for a parent who can establish that failure to move a child from an inappropriate educational program will cause irreparable harm to the child.

Although parents with the financial means to pay for a private placement may be able to exercise their prerogatives to choose an alternative private school for their children, there will frequently be occasions when families cannot afford the substantial

tuition necessary to obtain appropriate services for their children during the appeals process. During the period between a decision in favor of parents by the State Education Agency and final judicial resolution, Section 1415(e)(3) is no bar to change in the publicly funded program because the statute expressly exempts situations when the "State. . .education agency and the parents otherwise agree." 20 U.S.C. §1415(e)(3). See Blazejewski v. Board of Education, 560 F.Supp.701 (W.D.N.Y.1983)(citing, inter alia, Bureau of Education for the Handicapped policy letter, 211 Education for the Handicapped Law Report 28 (1978) [Appendix, p.A-1]. In other situations parents may need court intervention to require a change of educational placement necessary to prevent irreparable harm to the handicapped child.

There is no evidence of Congressional intent to rely on 20 U.S.C. §1415(e)(3) as

a means of denying relief or limiting judicial intervention favoring disabled children in their educational pursuits. As the Court of Appeals for the First Circuit correctly determined in Doe v. Brookline, supra, Section 1415(e)(3) cannot be construed "to preempt judicial powers of equity and to establish in their stead an absolute freeze on interim placement, program, or services . . ." Section 1415(e)(2) expressly authorizes district courts to provide all "appropriate" relief, including the power to issue preliminary injunctive relief in the appropriate exercise of discretion. Clearly, in the absence of a plain Congressional intention to withdraw them, traditional equity powers remain in the district court to enforce the Act. Brookline, at 916, citing Weinberger v. Romero-Barcelo, 456 U.S.305, 313 (1981); Porter v. Warner Holding Co., 328 U.S.395,398 (1946). See discussion, infra.

While Section 1415(e)(3) should continue to be construed to create a statutory duty for maintenance of the status quo, this interpretation will not bar a court from exercising its traditional equity powers, and as a matter of extraordinary relief, modifying a current educational placement when necessary to prevent irreparable injury generally.

The status quo provision must be read in the context of the Act as a whole. The fundamental objective of the EAHCA is to assure each disabled child a "free appropriate public education." 20 U.S.C. §1412(1); 121 Cong.Rec.37415 (Nov.19,1975)(remarks of Sen.Williams, principal author of Act). To construe Section 1415(e)(3) in a manner which would freeze a disabled child in a concededly inappropriate program thwarts the purpose of the Act. See Burlington, supra, 736 F.2d at 797. One district court aptly

described the relationship between the court's equity power and Section 1415(e)(3) in rejecting the argument that Section 1415(e)(3) acted as a "statutory bar" to its changing two disabled students' placements while the dispute was still pending:

> It defies comprehension to find Congressional intent in this statute [§1415(e)(3)] which would result in the denial of equitable relief to the vulnerable in an instance when the plaintiffs have been able to demonstrate the substantial likelihood that the educational authorities have failed to comply with the mandates of the Act and where patent irreparable harm will occur absent prompt judicial relief. Cox v. Brown, 498 F.Supp. 823, 827 (D.D.C.1980).

In a number of instances courts have properly exercised their equity powers under 20 U.S.C. §1415(e)(2) to modify or change the "current educational placements" of disabled students when school districts have refused access to the evaluation and placement process authorized by the EAHCA, e.g. Quackenbush v. Johnson City School District, 716 F.2d 141 (2d Cir. 1983) cert.denied 104 S.Ct.1426 (1984);

Blazejewski v. Board of Education of Allegheny, 560 F.Supp.701 (W.D.N.Y.1983); or when a district not having a public placement available has, nonetheless, failed to provide an appropriate private placement. Parks v. Pavkovic, 536 F.Supp.296 (N.D.Ill.1982); North v. District of Columbia Board of Ed., 471 F.Supp.136 (D.D.C.1979).

Injunctive relief must be available to effectuate the purpose of the EAHCA. It is, nonetheless, a very limited remedy which is insufficient to protect the interests of children who are in inappropriate placements during the appeals process. Courts will be reluctant to intervene prior to the conclusion of administrative proceedings except in extreme cases. Their refusal will be based on the EAHCA's emphasis on exhaustion of adminstrative remedies and on the heavy burden the parent would bear to prove a probability of success on the merits

before a decision by a hearing officer.[8] The Court of Appeals for the First Circuit even took care to admonish that "we are not authorizing courts routinely to reevaluate or enforce the final adminstrative decision regarding placement on a motion for preliminary injunction." Brookline, supra, 722 F.2d at 919.

The First Circuit properly analyzed the statutory purposes and structure of the EAHCA and found that Congress intended to allow courts to retain their traditional equity powers to grant preliminary injunctive relief to require a change to an appropriate publicly funded education program, when to do otherwise would risk irreparable harm to the handicapped child. Brookline, supra, 722 F.2d at 919. The Court should adopt this interpretation of the Act.

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[8] Following the decision of the hearing officer and as part of a court appeal, preliminary injunctive relief would be a more realistic remedy since the court would have the decision of the hearing officer to enable it to make a judgment of irreparable injury. Also the court would have jurisdiction of the appeal and would not be undercutting the administrative process.

III. THE EAHCA PROVIDES FOR BROAD EQUITABLE RELIEF, INCLUDING REIMBURSEMENT OF TUITION AND RELATED EXPENSES NECESSARILY INCURRED BY PARENTS TO OBTAIN APPROPRIATE SPECIAL EDUCATION FOR THEIR CHILD

A. Congress granted broad powers to the courts to effectuate the statutory objectives of the EAHCA

This Court has found that Congress enacted the EAHCA to vindicate the equal protection rights of millions of handicapped children in this country who were not receiving adequate special education services. Smith v. Robinson, 104 S.Ct.3457, 3468 (1984).[9] In order to enforce the rights provided in the statute, Congress required the states to establish an administrative hearing process which would give parents and students an opportunity to present complaints re-

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[9] The Court cites legislative history including Senate Report 94-168:

> It is the intent of the Committee to establish and protect the right to education for all handicapped children and to provide assistance to the States in carrying out their responsibilities under State law and the Constitution of the United States to provide equal protection of the laws. U.S.Code Cong.& Admin.News 1975, p.1437.

garding any matter relating to the provision of special education of the student. 20 U.S.C. §1415(b)(1)(E). A party aggrieved by the decision of the administrative hearing officer may bring a civil action in state or federal court, which court shall hold a hearing and "grant such relief as the Court determines is appropriate." 20 U.S.C. §1415(e)(2). This Court has held that the reviewing courts are required to make "independent decision[s] based upon a preponderance of the evidence." Board of Education v. Rowley, 458 U.S.176, 205 (1982), citing S.Conf.Rep.No.94-455 at 50, U.S. Code Cong.& Admin.News 1975,p.1503. This Court has also held that the Congress intended the procedures provided in Section 1415, culminating in state or federal court review to be a "comprehensive scheme" carefully tailored to assure the vindication of the equal protection rights of handicapped children. Smith v. Robinson, supra,

104 S.Ct.at 3468. The Act "establishes an enforceable substantive right to a free appropriate education." Id.

The EAHCA is clearly remedial. Doe v. Brookline, supra, 722 F.2d at 919. As a remedial statute, its provisions should be interpreted generously to further the important goals which Congress intended to achieve. Id., See also Northeast Marine Terminal Co. v. Caputo, 432 U.S.249,268 (1977). Moreover, the authority specifically vested by Section 1415(e)(2) is a broad grant of equitable power designed to give the courts flexibility in pursuing Congressional objectives. Brookline, supra, 722 F.2d at 919. A Congressional grant of equitable authority to the courts indicates an intention to give the courts flexibility in fashioning a remedy to make plaintiffs "whole" for injuries suffered on account of failure to comply with statutory requirements. Albemarle Paper Co. v. Moody,

422 U.S.405,418 (1975). See also Porter v. Warner Holding Co., 328 U.S.395,398-400 (1945) (The comprehensiveness of equitable jurisdiction should not be limited unless there is a clear legislative command to do so). As the First Circuit indicated in an earlier case on this subject, it is difficult to find in the statutory scheme of the EAHCA a "necessary and inescapable inference" that the reviewing court's traditional equity power to design appropriate remedies was somehow intended to be limited or denied. Brookline, supra, 722 F.2d at 917-18.

Especially given this Court's decision that Congress intended the EAHCA to be the exclusive means of vindicating the equal protection rights of handicapped children to receive appropriate educational services, Smith v. Robinson, supra, 104 S.Ct. at 3468, it is critical that the Act not be interpreted in a manner which will foreclose elements of relief that are essential

to furthering the goals of the statute. The task then is to determine what Congress intended. Id.

B. The authority of a reviewing court under 20 U.S.C. §1415(e)(2) to grant "such relief as the court determines is appropriate" includes restitution or reimbursement to parents for tuition necessarily paid to obtain an appropriate education for their child.

Defendants insist on referring to the relief sought by plaintiffs in this case as "damages," see e.g., Brief of Petitioners at 20 and at least one court has found that the EAHCA provides a damages remedy. Boxall v. Sequoia U.High School District, 464 F.Supp. 1104,1112 (N.D.Cal.,1979). Another Circuit Court of Appeals rejected a "general damages" remedy under the EAHCA, but found "limited damages" in the form of tuition reimbursement would be available in at least two "exceptional circumstances," when the child's physical health was at stake and

when school officials acted "in bad faith." Anderson v. Thompson, 658 F.2d 1205, 1213-14 (7th Cir.1981). Cp.Stemple v. Board of Ed., 623 F.2d 803 (4th Cir.,1980),cert.denied 450 U.S.911 (1981). A critical flaw in both petitioner's and the Anderson court's analysis is that it is not necessary to infer a "general damages" remedy to find that restitution or reimbursement of tuition is an appropriate component of the general equitable authority explicitly granted by Section 1415(e)(2).

Reimbursement of the tuition costs necessarily incurred by parents in order to assure appropriate educational services for their child is a very different and more limited type of remedy than a general damages remedy. Brookline, supra, 722 F.2d at 920, Doe v. Anrig II, 561 F.Supp.121, 127 (D.Mass.1983). See also Marvin H. v. Austin Indep.School District, 714 F.2d 1348,

1356 (5th Cir.,1983). The difference is that reimbursement of parents in these circumstances is, as the Court of Appeals appropriately characterized it, Burlington, supra, 736 F.2d at 799, Brookline, supra, 722 F.2d at 919, an element of equitable relief traditionally used by Courts to make an injured party whole. See, e.g. Albemarle Paper Co., supra, 422 U.S. at 416-19.(Title VII of the Civil Rights Act of 1964 should be interpreted in such a way as to allow relief which will make persons whole, including back pay awards, for injuries suffered on account of unlawful employment discrimination). Even when Congress has substituted limiting language regarding relief, district courts have retained the "historic power of equity" to award restitution as an element of relief. Id., at 416, citing Mitchell v. DeMario Jewelry, 361 U.S.288 (1960). Analyzing reimbursement of tuition as an element of equitable relief, rather than an item of

"general damages" at law, will allow this Court to more coherently articulate the statutory scheme and Congressional intent, including balancing of competing interests, in a manner which avoids the unexplained and somewhat artificial "exceptions" to the no-damages rule to which the Anderson court resorts. See Department of Education, State of Hawaii v. Katherine D., 722 F.2d 809 (9th Cir.1984)

Once the intent to create an equitable remedy is recognized, the Court should assume that Congress acted "cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." Mitchell, supra, 361 U.S.at 292.[10] Amici believe that the First Circuit correctly analyzed the availability of reimbursement

[10]This Court in Mitchell made it clear that the principles relating the equitable authority of federal courts enunciated in Porter, supra, are not limited to wartime statutes or statutes which explicitly authorize a reimbursement remedy. Mitchell, supra at 291.

as an equitable remedy, except to the extent that the Court sanctions reimbursement awards against parents.[11] Town of Burlington, supra at 801. See also Brookline, supra, 722 F.2d at 921.

The Fourth Circuit Court of Appeals differs mostly sharply with the First Circuit on the reimbursement issue. Stemple v. Board of Education, supra. The Stemple court's approach was to impose a limit on a court's authority under Section 1415(e)(2) on the basis that Section 1415(e)(3) is a barrier to a change of placement by parents. Id., 623 F.2d at 898. As we have demonstrated (Part II of this brief), Section 1415(e)(3) was not intended to be a barrier to a parent's choice to place his or her child in a private school paid for by the parent. The Stemple court's admission that the state could not enforce such a prohibition, Id.,

[11] See discussion infra, footnote 12.

supports this analysis, since an interpretation of a statutory scheme critical elements of which are unenforceable at very least lacks coherence, and more likely is a misreading of Congressional intentions. See discussion, Part I, supra.

The Seventh Circuit's decision in Anderson v. Thompson, supra, is quite consistent with the First Circuit's analysis of Section 1415(e)(2) and (e)(3). Although Anderson initially finds that §1415(e)(2) does not include a "general damages" remedy, Id. 658 F.2d at 1210, 1213, the Court finds that tuition reimbursement is available in "exceptional circumstances." Id. at 1213-14. Thus the Seventh Circuit agrees with the First Circuit that Congress did not intend to bar any reimbursement to parents. Id. Where amici differ with the Anderson court, and even with the First Circuit, is how an analysis of statutory goals inform a determination of when restitution or reimbursement is appropriate.

As we discuss in Part I of this brief, the underlying Congressional purpose behind enactment of the EAHCA was to assure appropriate educational services for handicapped children. See Smith, supra; Rowley, supra. To achieve this goal Congress established a system of substantive and procedural protections, including substantial parental involvement, but did not intend to displace traditional parental rights to obtain appropriate educational services for their children. See discussion, supra. The Anderson court correctly points out that Congress included the (e)(3) provision to minimize disruption of a child's educational program during the decisionmaking process. Anderson, supra, 658 F.2d at 121. Even if this Court does not agree with our analysis that (e)(3) does not apply to parental transfers, see discussion supra, it should reject both the Anderson and Stemple resolutions of the

reimbursement issue because neither use the primary purpose of the statute, providing appropriate educational services to handicapped children, as the informing principle.

As the First Circuit cogently observes, the Stemple court's rule treats special needs children "as though they were nonperishable commodities able to be warehoused until termination of in rem proceedings." Burlington, supra, 736 F.2d at 798. The Anderson rule would sanction parental transfer by reimbursement if there were serious risk of injury to the child's physical health or if school officials were acting in "bad faith." See Anderson, supra, 658 F.2d at 1213-14. However, if a parent initiated a transfer on the basis of a belief that circumstances met the Anderson standards, but a court later determined that the risk of injury was not "serious" or that school officials were wrong but not acting in "bad faith," then the parent would not be reimbursed. This

would be true even if the transfer was from a patently inadequate program to one which proved to be appropriate for the child. This reading would allow parents who act in furtherance of the statute's goal of obtaining education for their child to be denied a "free" education. 20 U.S.C. §1412.

Special education proceedings, including court appeals often go on for years. This case was initially filed in 1979, when both the school officials and parents agreed that the public school program which the child attended was inappropriate for him. See Burlington, supra, 736 F.2d at 789. Congress recognized that delay in obtaining appropriate remedial services for a handicapped child can be "highly injurious." Burlington, supra, 736 F.2d at 798, citing 121 Cong.Rec.37414,37416. The First Circuit correctly determined that:

> reimbursement promotes the purposes and policy of the Act.
>
> * * *
>
> If the school committee's proposed public placement is held inappropriate, then through reimbursement all parties are restored to the position the Act sought to achieve. In turn, "[f]or the successful parent to be left with what should have been the town's bill ab initio does not seem a municipal protection Congress would have intended, however great the shortage of funds."

Id., citing Brookline, supra, 722 F.2d at 921 (footnotes and citations omitted). The Stemple or Anderson rules, unlike the First Circuit's rule, fail to promote the Act's goal of achieving appropriate education for handicapped children by forcing parents, who have appropriately placed their children, to suffer economic loss (beyond the costs of pursuing their administrative and judicial remedies. See Smith v. Robinson, supra) in order to obtain an appropriate program for their children in a timely manner and, to avoid potential harm caused by inappropriate educational placement. Cp Burlington, supra, 736 F.2d at 789 ("We cannot in good

faith condemn the parents for moving a child from the 'current placement' all parties had agreed to be insufficient.") Moreover, in the experience of amici the Stemple and Anderson formulations, by allowing school officials to not only delay but avoid the cost of services intended to be their responsibility, would reward those officials who fail to recognize or refuse to assure equal access to education for handicapped children, the very "evil" that Congress was attempting to alleviate with the EAHCA. See Burlington, supra, 736 F.2d at 927.

It should be made clear that the stakes are relatively high, especially for a family of moderate means. A private day program for moderately to severely handicapped students in Massachusetts can easily cost $8,000-$15,000; a residential program $20,000-$45,000. The pressures on school department officials from the school committee, fiscal officers, and other constituents

are significant. The incentive for a school department to resist obtaining appropriate but costly services are very real and the costs for a parent trying to obtain appropriate education services can be substantial.

Foreclosing reimbursement will leave many parents without a meaningful remedy despite clear violation of Congressional mandates. Cp. Cannon v. University of Chicago, 441 U.S.677 (1979)(withholding of federal funds are authorized by the EAHCA is not an effective remedy for an individual litigant). Such a result is inconsistent with the broad grant of authority by "such relief as the court deems appropriate." See discussion supra.

Moreover, it must be pointed out that the type of limited restitution described by the First Circuit is simply not an undue burden on the local education authorities. Local education agencies have a clear mandate

to provide free appropriate education, including a private placement when necessary. 20 U.S.C. §1413(a)(4); 34 C.F.R.§300.400-300.450. All the First Circuit's standard does is put the school department, parent, and student where they would have been had the school not failed to meet its statutory responsibility. See Burlington, supra, 736 F.Supp.at 798. In fact it leaves the school in a somewhat better position because it is allowed to delay payment until the restitution order is entered. Municipal government routinely appropriates funds to meet such expenses, past and future, and supportive funding is available from numerous state and federal sources. The First Circuit standard for reimbursement for parents' tuition expenses is strongly supported by the traditional analysis of equitable authority and does not impose any

new burden on school officials.[12] It is an appropriate analysis of Congressional intent and should be applied in this case by the Court.[13]

---

[12]Amici do differ with the First Circuit in its analysis of the appropriateness of orders requiring parents to reimburse school departments. See Burlington, supra, 736 F.2d at 800. Under the First Circuit's system if a parent is able to convince a U.S.District Court judge that they do not only have a good faith opinion that their child belongs in a private school program, but can show likelihood of success and irreparable harm, they may be able to obtain a preliminary injunction requiring the local educational agency to pay for the placement pending appeal. However, if the parents ultimately lose, they may be ordered to reimburse the town. Id. Such a risk for a parent may substantially defer their attempting to expedite the placement and is completely unfair for a parent who is acting in good faith and is able to meet the preliminary injunction standard. Parents in such circumstances should be able to rely on the judgment of a trial court judge that they are not only acting in good faith, but are likely to succeed on the merits by showing that the services which they seek are those which should be publicly funded under the EAHCA.

[13]The authority to reimburse a parent's special education tuition expenses which should have been the responsibility of local school officials is well established in Massachusetts law. See Amherst-Pelham Regional School District v. Department of Education, 367 Mass.480 (1978). In Amherst-Pelham, the Supreme Judicial Court of Massachusetts analyzed G.L.c.71B, the Massachusetts

CONCLUSION

For the reasons stated above, amici urge that the holding of the Court of Appeals for the First Circuit that parents' unilateral transfer of their child is irrelevant to 20 U.S.C. §1415(e)(3) and does not constitute a bar to reimbursement should be affirmed. Additionally, we urge this Court to affirm the appellate court's ruling that reimbursement is available under the EAHCA as a matter of equitable relief under 20 U.S.C. §1415(e)(2).

---

footnote, cont'd

complement to the EAHCA, and found that the state law provisions similar to 20 U.S.C. §1415(e)(3) are intended to prevent unnecessary disruption of a child's educational program, but in no way limit school officials' obligation to provide an appropriate program. Id. The S.J.C. found that parents may enforce this obligation by obtaining reimbursement of tuition when the program chosen by the parent is ultimately determined to be appropriate for the child. Id. This Court should carefully consider the resolution by a state's highest court of the policy issues at stake here and more importantly should give such state-created procedural and substantive rights substantial, perhaps controlling weight when determining the rights and duties of citizens of that state. See Mills v. Rogers, 457 U.S.291, 300, 303-4 (1982).

Respectfully submitted,

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APPENDIX

Inquiry by: Roger Brown
Association Commissioner and
Director
State Department of Special
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31 St. James .venue
Boston, Massachusetts 02116

Digest of Inquiry
(Oct.19,1977)

Is state administrative procedure, providing that filing of petition for judicial review of SEA due process hearing shall not operate as stay of implementation of SEA decision, inconsistent with requirement of Reg.121a.509 that hearing is final unless appealed?

Text of Response
(May 4, 1978)

As we understand your concerns, you believe it is important for the Massachusetts Department of Education to be able to enforce its hearing decisions without waiting for any judicial proceedings to be completed. You indicated this would create the potential for great

harm to children, because it could mean a child might remain in an inappropriate program for years, when a party appealed the decision of the hearing officer.

The Bureau could approve a State procedure which allowed the Massachusetts Department of Education to implement the decision of a hearing officer when the Department and a parent of the handicapped child agreed that the decision should be implemented, but the local educational agency disagreed with the decision and was appealing the decision in the courts. However, the MDOE could not implement a decision which the parents were appealing in the courts.

This interpretation is based on §615(a)(3) of the Education of the Handicapped Act [§1415] which provides that unless the State or local educational agency and the parents agree, the child must remain in the current educational placement during the pendency of any

administrative or judicial proceeding.

Whether the local educational agency would be responsible for the costs of the placement during the pendency of any proceeding in which the local educational agency were challenging the hearing officer's decision is a matter between the State and local educational agency. Of course, the parents could not be charged.

William Halloran
State Plan Officer
Field Service Branch/
DAS
Bureau of Education
for the Handicapped

From 2 EHLR 211:28

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No. 84-433.

In the Supreme Court of the United States.

OCTOBER TERM, 1984.

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PETITIONERS,
v.
DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO A/K/A JOHN DOE, SR., AS HE IS NEXT FRIEND OF MICHAEL PANICO A/K/A JOHN DOE, JR.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Objection of Petitioners to Motion for Leave to File Brief Amici Curiae on Behalf of Developmental Disabilities Law Center, Center for Law and Education, Massachusetts Advocacy Center, Federation for Children With Special Needs, Association for Children and Adults With Learning Disabilities, Epilepsy Foundation of America, National Society for Children and Adults With Autism, and the Association for Persons With Severe Handicaps.

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Petitioners object to the Motion of the above-named parties to file a brief, *Amici Curiae*. Rule 36.3 of the rules of this

Court states in part, concerning a motion for leave to file a brief *Amicus Curiae*:

> The motion shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five pages in length.

The motion filed on behalf of the above-named parties does not begin to comply with this rule. It does not "set forth facts or questions of law that have not been" adequately presented, nor does it set forth any "reasons for believing" that any facts or questions of law have not been adequately presented. Indeed, the would-be *Amici* have told the Court nothing more than that they "have had extensive involvement with the enactment and implementation of" EHA and "believe that the Court would benefit" from their arguments, apparently because they have "a broader perspective" than the parties.

Petitioners have withheld consent to the motion to file the brief, *Amici Curiae*. Respondents have filed exhaustive briefs in this case. There are two separately represented respondents, the Department of Education of the Commonwealth of Massachusetts and the parents of the handicapped child, each represented by highly competent counsel supported by a large staff. Moreover, as might be expected, the briefs of the respective respondents are complementary in several respects, the brief for the Department emphasizing the respect allegedly due the findings of the Hearing Officer and the brief for the parents emphasizing how petitioners' proposed construction of EHA would impinge upon this child and children similarly situated.

Petitioners, on the other hand, are singly represented by a four member firm. To require that petitioners' counsel read,

digest, and, if need be, respond to an additional 59 page brief is to impose on them unduly. It also imposes upon this Court, which will certainly have, without the brief of the would-be *Amici*, more than sufficient reading and more than adequate access to all sides of the questions presented.

Petitioners, therefore, object to the motion to file a brief *Amici Curiae*.

Respectfully submitted,

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Petitioners' Reply Brief.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners' Reply Brief.

Statement of the Facts and Prior Proceedings — Again.

Both respondents were apparently dissatisfied with petitioners' statement of the case, and, as is their right, Rule 34.2, submitted their own statements of the case. We suggest, however, that the briefs of both respondents contain numerous misstatements of the record, allegations *dehors* the record, and assertions contradicted by the record. Some of these have been the subject of prior discussion by petitioners and some will be analyzed in argument, but others deserve comment at this point.

The Department's brief states at pp. 10-11: "The factual dispute centers around the origin and nature of his [Michael Panico's] learning disability and the appropriate educational placement to meet his individual needs". The first part of this statement, echoed at pp. 5-6 of the Panicos' brief, was never correct. See Argument I, *infra*. Petitioners have, at least since Michael was in the second grade, considered him to have a learning disability (J.A. 42, 198-199; R.A. III, p. 421), and both the hearing officer and the District Court concurred (Pet. A. 3a, 15a, 60a). Although, as the District Court noted, "the precise nature or origin of his difficulty is in dispute" (Pet. A. 60a), the experts were also "in substantial agreement as to the manner in which Michael should be helped" (Pet. A. 61a). Any factual dispute concerning the nature and origin of Michael's dyslexia is peripheral rather than central to this case.

The second part of the statement quoted from pp. 10-11 of the Department's brief was once true but no longer is. At trial in the District Court, petitioners took the position that Pine Glen had offered Michael a free appropriate public education in the least restrictive placement, a position that respondents would have been expected to oppose. Yet, curiously, at the trial neither respondent presented a scintilla of evidence, apart from the hearing officer's decision, that placement at the Carroll School was superior. The District Court found in favor of the Pine Glen placement (Pet. A. 61a, 66a). The Court of Appeals reversed the District Court's decision primarily on the ground that the District Court did not properly evaluate the seriousness of past "procedural" violations which had led the hearing officer to decide in favor of the Carroll School placement. See Petitioners' Bf., pp. 21-22, 29-33, 51-52. The central factual dispute, as the First Circuit conceived it, is whether the "violations" are serious enough to impose upon petitioners the duty of paying damages to the Panicos in the form of tuition and related expenses for Michael's education at the Carroll School.

At page 16 the Department's brief states:

> The school agreed to have Dr. Lott, the pediatric neurologist from Massachusetts General Hospital who had previously tested Michael, coordinate the psychological testing necessary for the preparation of the IEP. J.A. 5. Nevertheless, when the IEP for Michael's fourth grade was prepared in the early summer of 1979, it was without the benefit of Dr. Lott's latest test results. J.A. 204, 330-31.

Although Dr. Lott had met with the parents the week following May 25, 1979 to coordinate the testing, the test results, which were to be shared with Burlington in order to prepare the IEP (R.A. III, pp. 391, 394; J.A. 201-204), were not forwarded until after Mr. Panico demanded the IEP on June 27th. It was the Panicos, not petitioners, who sought to have the IEP prepared without Dr. Lott's test results. The very pages of the Joint Appendix cited by the Department bear this out. At page 204, Mrs. Arin, petitioners' Core Evaluation Administrator (J.A. 190), testified that on June 26, 1979, Mr. Panico called, demanding the Educational Plan and stating that it was already ten days overdue and "he was planning to reject it anyway."

At pages 330-331 Mr. Panico testified as follows:

> Q. Now, between June 4th and June 28th or 9th, did you have any further conversations with Mrs. Arin regarding Michael or the preparation of the plan?
>
> . . . .
>
> On June 27th, I called Jean Arin's office and demanded the plan. . . . I told her that I wanted the plan, I had to have it. And she said she was sorry, that it wasn't ready. . . .
>
> And we then — we talked for a few minutes. I told her I wanted the plan because I was contemplating appealing if she was going to insist that Michael stay in John McAleer's classroom for the upcoming year.

In other words, Mr. Panico had already decided by June 27th to reject the IEP, and any failure of the IEP to reflect Dr. Lott's input was, contrary to the implications given by the hearing officer (Pet. A. 19a), inconsequential. Dr. Lott's report was written on July 10, 1979 (Dept. E p. 18), one week after the IEP was rejected by the pare. (J.A. 18), and it came to petitioners on July 26, 1979 (R.A. IV, pp. 179-180).

Footnote 17 at p. 27 of the Department's brief asserts: "No IEPs have been prepared for Michael since the judicial proceedings began in 1980. Although Burlington has claimed repeatedly that the parents improperly refused to make Michael available for evaluations during the course of the litigation, the parents have denied this . . . ." See also Panicos' Bf., p. 28, n.10. The parents have never denied petitioners' assertions. When petitioners moved in the District Court for summary judgment on the basis of written evidence of the refusal (J.A. 181-185, 189), the Panicos filed no counter-affidavits and did not otherwise controvert what their attorney had said in writing. In denying summary judgment, the District Court appeared to accept the uncontroverted allegations of fact with respect to making Michael and his records available in an appropriate manner for the drawing of a new IEP (Pet. A. 49a), as indeed it should have, but deemed the evidence irrelevant (Pet. A. 55a-56a).

The Panicos' brief asserts at page 14: "On June 28, 1979, Burlington produced an IEP. The plan, which described Michael's problems as stemming from 'negative attitudes and depression,' proposed to transfer Michael to Mr. McAleer's class at the Pine Glen School." The IEP contains no such statement. The only statement on this subject in the IEP says almost exactly the opposite (J.A. 9):

> Michael has a positive self image regarding his body and competence in sports activities. However, Michael perceives that adult and peer expectations for academic performance are beyond his reach. The perceived negative

> attitudes concerning academic competence, contribute to his questioning his self worth and cause him to become anxious, sad and angry.

The Panicos' brief states at p. 16:

> In early August, Mr. Panico also made contingency plans to enroll Michael in the Carroll School. On August 10, 1979, he made a deposit of $200 to secure a place for Michael (R.A. IV, 434). Only when it became clear in late August that mediation had failed and that the administrative hearing would not begin until late September did the Panicos actually enroll Michael at the Carroll School.

Nothing in the record supports the allegation of the first sentence, and the last sentence is contradicted by a letter from Massachusetts General Hospital, dated June 27, 1979, and introduced by the parents at the administrative hearing (R.A. IV, p. 360), stating: "Mr. Panico is not in a financial position to fund tuition at Carroll School but is committed to enrolling him there, should this be in Mike's best interest." If the Panicos mean no more than that they had hoped during the summer of 1979 that the Town of Burlington would agree or would be ordered to fund Michael's tuition in the Carroll School before the start of the school year, the point is hardly worth making. If the point of the quoted paragraph is that the Panicos maintained during the summer of 1979 an open mind concerning the possibility that the proposed placement in the Carroll School was inappropriate, virtually every bit of the evidence refutes it. See pp. 3-4, *supra*; Petitioners' Bf., p. 25, n.14.

Finally, at pp. 70-71, n.21 the Panicos' brief states:

> Petitioner has correctly pointed out that learning disabilities are difficult to remedy (Brief at 39). Petitioner's argument that it makes no difference what educational placement is offered a child with learning difficulties, or when such a placement is offered, is contrary to the basic propositions on which the act was founded.

Petitioners have never argued the nonsensical position attributed to them in the second sentence quoted above. What petitioners have pointed out at p. 40 and in n.37 of their original brief is that neither in this action nor in the general literature is there any indication that expensive private education leads to more effective remediation of learning disabilities than does remediation in a public school setting such as Pine Glen.

Argument.

I. The Repeated Misstatements in Both Respondents' Briefs that the Burlington School Authorities had Misdiagnosed Michael Panico as Suffering from a *Primary* Emotional Problem Amply Prove the Wisdom of Construing Title 20 U.S.C. § 1415(e)(3) as Petitioners have Argued it Should be Construed.

The brief filed on behalf on respondent Department of Education contains the following statement on pp. 11-12:

> Michael attended the Memorial School, a public school in Burlington, Massachusetts, from kindergarten through the third grade. As early as the first grade, the parents and the school disagreed about the source of Michael's learning problems. Burlington believed them to be primarily the result of emotional problems. . . . J.A. 38-39.

There is absolutely nothing at pp. 38-39 of the Joint Appendix to substantiate the quoted position of the Department. Taking the statement of Mr. Panico found on those pages as true for purposes of discussion, we note that it says no more than that Michael's first grade teacher considered him immature. Immaturity is by no means to be equated with an emotional problem, especially in a child of six. Thus, there is simply no

reason to suppose that Mrs. Reber, Michael's first grade teacher, believed that Michael suffered from some emotional disability, and indeed her testimony in the District Court totally belies any such belief. See R.A. II, pp. 26-36.

At no time did petitioners ever believe that Michael suffered from a primary emotional problem. The report of Mr. Cavanaugh, the school psychologist, was read to Mr. Panico (J.A. 92); it contains no such statement (R.A. IV, pp. 129-130). The effort to foist on petitioners the position that Michael suffered from a primary emotional problem sounds through the briefs of both respondents as a recurring theme.[1] See Panicos' Bf., pp. 5-6, 12-13, 14-15, 62; Dept. Bf., pp. 12, 15-17, 19-20, 88-90. Why is it so important for respondents to attempt to give this court the impression that the Burlington School Department believed in the spring of 1979 or at any other time that Michael's problems were primarily emotional? The answer to this question is relatively simple. Mr. Panico at various times gave numerous reasons for having rejected the 1979-1980 IEP.[2] Probably, however, his most cogent

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[1]Sometimes the theme is played subtly. At p. 14 the Panicos' brief states: "The Panicos soon learned this class [Mr. McAleer's] was generally referred to in the Burlington school system as the 'primary adjustment class.' (Pet. A. 7a)." No such statement is found at Pet. A. 7a (a page from the hearing officer's report). In fact, what the hearing officer does state at p. 7a is: "Mr. Foley agreed that in prior years Mr. McAleer's class has been called the 'primary adjustment class.' This was no longer true, he said."

[2]Mr. Panico gave the following reasons for rejecting the IEP.

BSEA TESTIMONY:

Michael didn't belong in a class for emotional children and Mrs. Black said the class would be detrimental (J.A. 105). Meade and Mason were not present at the June 4th meeting (J.A. 106). Becky Silverstein and the parents had no input as to the educational plan (J.A. 106, 153). The plan was not signed and Burlington had changed Michael's program in the past (J.A. 106). The Plan was not reflective of Michael (J.A. 106-107, 141-152). There was no provision in the plan for counselling (J.A. 107). The IEP had nothing addressing a learning disability (J.A. 107). The Ed. Plan called for a primary adjustment class (J.A. 107). There was no provision for integrating him even for math, when Michael was at grade level or above (J.A. 108, 111). Mrs. Hennessy's, Ms. Meade's and Ms. Mason's statements were in conflict with pp. 4-5 of the IEP (J.A.

reason was his opinion (a) that Mr. McAleer's class was for severely emotionally disturbed children and (b) Michael was not in the spring of 1979 or, presumably, at any other time severely emotionally disturbed (J.A. 47, 105, 332, 335). Unfortunately for Mr. Panico, the evidence shows him to be

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108). Memory problems were not addressed (J.A. 109). The IEP did not "spell out" a way to help Michael with his reading problems (J.A. 109). The Plan was not adequate or appropriate (J.A. 112). Michael did not want it (J.A. 112-113, 131). In 1977 Burlington did not prepare an IEP (J.A. 113). Michael's program was changed and he regressed (J.A. 113). Burlington ruined Michael (J.A. 113). Sally Smith, author of No Easy Answers told him that Mr. McAleer's class would kill Michael (J.A. 114). The Education Plan did not have a "measurement factor" to gauge Michael's progress (J.A. 114).

AT TRIAL (DIRECT EXAMINATION):

The primary reason was that the IEP was for an emotionally disturbed child (J.A. 332). The doctors and Mrs. Black advised against it (J.A. 332, 335). The IEP did not do anything to address Michael's reading problems (J.A. 332, 333, 335). It had good objectives, but were the same as the previous plan that had failed (J.A. 332). The IEP did not say how the reading objectives would be accomplished (J.A. 332). One-to-one tutorial was not specified (J.A. 332). Michael couldn't function with seven different children with emotional problems (J.A. 337). The school had cut his reading program (J.A. 333). Parents were not notified of testing (J.A. 333). The plan was not signed (J.A. 333). The plan did not describe his son (J.A. 333-335). There were no special teachers mentioned in the plan (J.A. 335).

CROSS EXAMINATION:

He had no more faith in the town after the violations, after it cut the time with Mrs. Black, after it ignored the diagnosis of dyslexia (J.A. 369). The principal had not signed the plan (J.A. 369, 370). The plan was thrown together in one day because it was late (J.A. 369). Mrs. Black said the class would destroy Michael (J.A. 371-372). The plan did not explain how the skills would be taught (J.A. 373). The plan was for an emotional child (J.A. 373-374). Dr. Lott advised against the school placement (J.A. 376).

It is interesting to note that where Panico purported to quote statements made to him by persons who testified at the BSEA hearing or in the District Court, their testimony does not reflect these allegations; *e.g.*, Mrs. Black never testified that she told Panico that placement in Mr. McAleer's class would "kill Michael" or gave any testimony to that effect even though she was his witness at the BSEA hearing. Panico knew, no doubt, that had he attributed such a statement to her, she would have been cross-examined with respect to it (see J.A. 353). Dr. Lott never testified that he advised the Panicos to reject the IEP (R.A. III, pp. 72-102), which Panico apparently never even showed to him; Dr. Lott saw the IEP for the first time at the BSEA hearing (R.A. III, pp. 90-92).

wrong on both points, and, with more truth than charity it can be said that Mr. Panico "fell over himself" as a witness in the District Court attempting to deny that his son had severe emotional problems in the spring of 1979 (J.A. 354-359, 365-367; compare J.A. 132-133). This is not to say that Michael's problems were primarily emotional. A learning disability may well generate emotional problems by its very nature. Not being able to do as well as other children in a basic activity is unquestionably frustrating for a child like Michael, who is above average in intelligence. Emotional problems often lead to behavioral problems, and indeed Michael was a behavioral problem both in his third grade at Memorial School (R.A. IV, p. 143) and in the following years at the Carroll School (R.A. II, pp. 4-51, 4-55 to 4-58; R.A. I, p. 228).

But the IEP that was drawn up in June of 1979 stressed primarily academic objectives in reading (J.A. 12, 14, 16; Pet. A. 7a). Mr. Panico was not correct in believing that Mr. McAleer's class was for the emotionally disturbed. Mr. McAleer had seven children in his class in 1979-80 (R.A. III, p. 500). One of those children apparently had a primary emotional disability; for another child there were simultaneous educational objectives of teaching appropriate behavior and raising reading level (R.A. III, pp. 500-501). The latter child had been fully mainstreamed by the beginning of November, 1979 (R.A. III, p. 501). The primary disabilities of the other five children were in the areas of reading and mathematics (R.A. III, p. 500); their problems were basically academic not basically emotional (R.A. III, p. 485). To quote Mr. McAleer's own words (J.A. 227):

> Q. Mr. McAleer, was yours a classroom devoted to children who had Special Education needs?
> A. Yes.
> Q. What were these needs, please?
> A. The needs were basically those of both academic and somewhat social and behavioral. Academic, they were

behind grade level. Social, ranged from a variety of situations.

There is simply no doubt that in the spring of 1979 Michael fitted into both aspects of Mr. McAleer's class.

Respondents undoubtedly recognize that if the most compelling reason given by Mr. Panico for rejecting the IEP and enrolling Michael in the Carroll School falls apart under careful scrutiny, he would almost certainly not be entitled to reimbursement of the tuition and related expenses incurred in educating Michael at the Carroll School. This recognition is probably what impels respondents to argue repeatedly that this was a case of misdiagnosis or missed diagnosis on the part of the Burlington Public Schools, which (according to respondents) simply assumed, wrongly, that Michael's problems were primarily emotional. That the Panicos were unable to convince the Hearing Officer (Pet. A. 7a, 19a), the District Court (Pet. A. 60a-61a), or the Court of Appeals (Pet. A. 119a) that this was the conflict in this case does not seem to deter them or the Department from attempting to portray it in this light. That portrayal is obviously aimed at avoiding the issue of whether the 1979-1980 IEP was appropriate.[3]

Now, what is the larger significance of the fact that Mr. Panico rejected an IEP and chose for Michael an expensive

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[3] Of course, even if Michael had not been emotionally disturbed in the spring of 1979 and even if Mr. McAleer's class had been primarily for emotionally disturbed children, it would not necessarily follow that the placement in Mr. McAleer's class was erroneous. See *Anderson* v. *Thompson*, 658 F.2d 1205, 1208 (7th Cir. 1981) (*semble*, placement of child who was not mentally retarded in class for mentally retarded was not necessarily improper placement). The opinion of the Court of Appeals does refer to the failure of the District Court to resolve certain conflicts in diagnoses (Pet. A. 119a), but the conflict was not between an emotional and a neurological problem but whether Michael's primary problem was attention deficit disorder or some other neurological problem (Pet. A. 119a). As explained on pp. 20-21 of petitioners' brief, there was no error in the failure of the District Court to resolve whatever differences there were in the diagnoses of the experts.

private school for totally inappropriate reasons? Both respondents argue at length in their respective briefs that § 1415(e)(3) should not be construed to mean what it says. Panicos' Bf., pp. 57-80; Dept. Bf., pp. 71-94. Compare *Mills Music, Inc.* v. *Snyder*, 105 S.Ct. 638, 645 (1985). Indeed, the Panicos appear to take the extreme position that (e)(3) should be read as a limitation only on the right of school authorities to change the placement of a child during the pendency of proceedings (Panicos' Bf., pp. 69-80, 83-88). Under their construction, (e)(3), which states that "unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement . . ." would be judicially reworded to say "unless the parents decide otherwise, the child shall remain in the then current educational placement . . .." While the construction of a Federal statute could hardly turn on the facts of one case, one would expect to find something in this case to indicate that the Panicos had, at least from an educational standpoint, made the "right" decision when they placed Michael in the Carroll School. As petitioners' original brief pointed out and as the District Court found, such evidence is lacking (Petitioners' Bf., p. 40; Pet. A. 61a). And when the evidence is examined in detail, it turns out that not only did they make a wrong decision but also that they made it on the basis of misinformation. In the absence of any basis to believe that other parents who do as the Panicos did make better choices or at least have better reasons to support their choices, it would be a serious mistake to rewrite the language of Congress to accommodate the Panicos or parents similarly situated.

II. Nothing in the Federal Regulations Supports the Position that Appropriate Relief under 20 U.S.C. § 1415(e)(2) Includes Damages by Way of Reimbursement of Tuition.

The Department argues in its brief at p. 53, n.34:

> This interpretation [that the District Court may award damages] is further supported by the regulations promulgated by the United States Department of Education implementing the EHA. These regulations . . . provide that the "due process procedures" available to parents, which include an administrative hearing and judicial review, will be used to resolve the question of financial responsibility for a private school placement. 34 C.F.R. § 300.403.

The text, however, of the regulation supports petitioners' position, not respondents'. Section 300.403(a) makes it clear that the District Court was correct and the Court of Appeals in error in ruling on the right to reimbursement of private school tuition. The correct rule is that there is no reimbursement of tuition when the IEP offers a free appropriate public education, no matter what transpired between the parents and the local (or State) educational agency before the IEP was drawn. See Petitioners' Bf., pp. 29-33, 51-52.

The Department presumably is seizing upon the language in § 300.403(b) concerning "financial responsibility." But that language cannot be read out of context; § 300.403(b) states:

> Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 300.500-300.514 of Subpart E.

Sections 300.500-300.514 do not address the District Court procedures except to point out their availability. They address

only the administrative procedures. Moreover, nothing in § 300.403(b) suggests that "financial responsibility" thereunder may be retroactively considered. Section 300.403(b), properly construed, stands for no more than the proposition that, subject to judicial review, a hearing officer's decision may determine *in futuro* responsibility for paying for aspects of a particular placement.

III. If, as Respondents Argue, the Source of § 1415(e)(3) is Found in Language Used by Federal Courts in Pennsylvania and the District of Columbia, Comparison of that Language with the Language of (e)(3) Supports Petitioners', Not Respondents', Positions.

Both respondents, citing *Board of Education* v. *Rowley*, 458 U.S. 176, 192 (1982), argue that § 1415(e)(3) derives from specific language used in the consent judgments in *Pennsylvania Association of Retarded Children* v. *Pennsylvania ("PARC")*, 343 F.Supp. 279, 303 (E.D. Pa. 1972) and *Mills* v. *Board of Education of District of Columbia*, 348 F.Supp. 866, 883 (D.D.C. 1972) and that (e)(3), therefore, should not receive any construction that would limit the right of parents to place handicapped children in private schools since in these cases no such construction was intended. Dept. Bf., pp. 83-86; Panicos' Bf., pp. 71-78. That the language in these cases is far from identical and that in *Mills* it was used in relation to changes of placement pending resolution of disciplinary charges, 348 F.Supp. at 880, 883, does not seem to give either respondent pause.

In any event, though the assumption that (e)(3) derives from *Mills* and *PARC* may be well-founded, the inference that respondents attempt to draw from that assumption is not. Congress, when it drafted (e)(3) made significant changes from the (supposedly) protypical language found in these decisions. Specifically, it required the agreement of the parents (or guardian) *and* the local (or State) educational authority before the child's

placement could be changed during the pendency of proceedings under 20 U.S.C. § 1415. The usual rule is that when language used in a bill is changed in the legislative process or language used in a statute is changed by amendment, the change is assumed to be meaningful and the statute will not be read as though the change had not taken place. *United States* v. *McClure*, 305 U.S. 472, 477-478 (1939) (amendment of statute); *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974) (change of bill in committee). There is no reason to reach a different result when the language of an act is derived from another source such as a judicial opinion but is significantly changed by Congress.

IV. Whether Payment of Tuition is Appropriate Relief when an IEP is Found To be Inadequate is an Irrelevant Issue in this Case, or, if Relevant, Should be Decided Adversely to Respondents.

A point argued repeatedly in both respondents' briefs and the brief of the *amici* is that if EHA is to function as Congress intended, the District Court must have power to award reimbursement of tuition under 20 U.S.C. § 1415(e)(2) and, concomitantly, § 1415(e)(3) cannot bar an interim change of placement by the parents. Dept. Bf., pp. 42-63, 87-90; Panicos' Bf., pp. 39-44, 64-80; *Amici* Bf., pp. 3-33, 33-39, 40-57. This is a point that the Court ought not to reach in this case, or if it does reach it, should decide adversely to respondents.

A. *Where It Is Clear That Petitioners' 1979-1980 IEP Would Have Afforded Michael a Free, Appropriate Public Education, It Is Unnecessary to Decide what Relief Could Be Afforded In Other Circumstances.*

Both respondents persistently argue as though petitioners' IEP and the Pine Glen placement were inappropriate (Panicos' Bf., pp. 41-51, 52-55, 62, 77, 79-80, 89-91; Dept. Bf., pp. 36-38, 39-41, 42, 47-48, 53-63, 68, 87-93). Neither respondents nor *amici* seem to have understood an important thrust of petitioners' argument; certainly they have not met it. That is, where petitioners prepared and were prepared to implement an IEP that would have afforded Michael a free, appropriate public education, neither the District Court nor the hearing officer could award damages based on petitioners' alleged past "procedural violations." Petitioners' Bf., pp. 29-33, 47-48, 51. The Panicos' brief at p. 51, appears to concede "that tuition reimbursement may be denied where a school district has provided an adequate program." See also Dept. Bf., p. 56.

In deciding that petitioners' IEP was appropriate, the District Court did not, in the words of *Rowley*, 458 U.S. at 206, "substitute [its] own notions of sound educational policy for those of the school authorities . . .." Instead, it did no more than disregard immaterial aspects of the hearing officer's decision such as whether petitioners had in the past zealously accorded Michael all procedural and substantive rights (compare Pet. A. 13a with Pet. A. 60a), whether Michael worked well in small groups free from distraction (Pet. A. 14a),[4] whether Michael needed experienced teachers (Pet. A. 14a),[5] and whether Michael needed to continue with Orton-Gillingham (Pet. A. 14a).[6] It took into account Federal requirements for a

[4] Immaterial since there were five or six students in Michael's classes at the Carroll School and seven students in the proposed class at Pine Glen School (R.A. II, p. 4-40; R.A. III, p. 485). There were few distractions at Pine Glen (J.A. 228-230, 241-242, 245).

[5] Immaterial since Mr. McAleer was at least as experienced as Michael's Carroll School teacher (J.A. 225; Compare R.A. II, pp. 4-36 to 4-40).

[6] Immaterial since a form of Orton-Gillingham was used at Pine Glen though it was more flexible (Pet. A. 61a).

least restrictive placement with opportunities for mainstreaming (Pet. A. 66a). Unless, therefore, as the First Circuit held, damages are to be awarded for past violations, the issue of whether the District Court could award damages by way of reimbursement when there has been a failure to prepare an appropriate IEP is in this case moot.

It is a fundamental principle of our jurisprudence that courts should not decide issues unnecessarily. *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U.S. 426, 432 (1948); *Paschall* v. *Christie-Stewart, Inc.*, 414 U.S. 100, 101 (1973) *reh. den.* 414 U.S. 1138 (1974). In *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 29-30 (1981) *same case* 104 S.Ct. 900, 921 (1984) this Court has twice explicitly refused to decide whether Federal law creates a private cause of action for damages on the part of retarded citizens. The Court declined to reach the issue even though it was squarely presented on the facts. In the present case where the IEP was properly judged to be appropriate, the issue of whether damages may be awarded when an inappropriate IEP is drawn is not presented.

B. *If the Court Should Reach the Issue, a Reviewing Court Can Order Appropriate Relief Under 20 U.S.C. § 1415 (e)(2) Without Awarding Retroactive Tuition.*

The above issue is, in the briefs of respondents and *amici*, confused with a separate one: whether tuition payments may be awarded *prospectively* when a court finds an IEP to be inappropriate. See Dept. Bf., pp. 42-71; Panicos' Bf., pp. 39-56; *Amici* Bf., pp. 40-57. The latter issue is simply not presented in this action. One reason for its absence is the absence of any IEP for years beyond 1979-1980. See Petitioners' Bf., pp. 35-36. A second is that by the time this action was tried, the 1979-1980 IEP had long expired. See J.A. 3, 7. A third, of course, is that the IEP was found appropriate. However if an IEP is found to be inappropriate, it will not necessarily or

even often follow that a prospective award must include a direction to pay private school tuition. See, *e.g.*, *Irving Independent School Dist.* v. *Tatro*, 104 S.Ct. 3371, 3375 (1984) (IEP modified by Court to provide that child receive catheterization service in public school).[7] Even in cases in which a court concludes that the IEP was inappropriate and that the local (or State) educational agency has no program that will avoid private school tuition, the court can state its decision and remand to the appropriate administrative agency for further proceedings consistent therewith. This is certainly the usual procedure by which Federal courts deal with harmful error when they review the decisions of Federal agencies. See *National Labor Relations Bd.* v. *Food Store Employees Union*, 417 U.S. 1, 9-10 (1974). It is not to be lightly inferred that educational agencies will ignore such a remand or that, if they do, the Department of Education will not invoke sanctions. See 20 U.S.C. § 1416(a).

If, however, a court may, under § 1415(e)(2) issue a judgment that requires the funding of tuition *in futuro*, such a judgment is, unlike a retroactive judgment, truly in the nature of equitable relief. As was said in *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 627 (1950): "But . . . 'equity will administer such relief as the exigencies of the case demand at the close of the trial.' *Bloomquist* v. *Farson*, 222 N.Y. 375, 380." Likewise, a preliminary injunction, see Petitioners' Bf., pp. 49-51, speaks to the future.

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[7] The Panicos' argue that this Court's affirmance in *Tatro* implies affirmance of the District Court decision in that case granting reimbursement. *Tatro* v. *Texas*, 516 F.Supp. 968, 978 (N.D. Tex. 1981). Panicos' Bf., pp. 46-48. Even the decision of the Fifth Circuit in *Tatro* did not discuss the right to reimbursement, 703 F.2d 823 (1983). Nor does the opinion of this Court. A judicial decision is not to be read as authority on a point not discussed. *Cf. United States* v. *Neifert-White Co.*, 390 U.S. 228, 231 (1968). This is true even when the point was discussed in a decision of a lower court in the same case and the lower court's decision is affirmed on appeal, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976), and particularly true of a case like *Tatro* that is before the court on certiorari and, thus, normally, considered only on the issues as to which certiorari is granted. Stern, Gressman, SUPREME COURT PRACTICE (5th ed.), p. 361 (1978).

When, however, a court orders retroactive funding of tuition, it is not awarding "an element of *equitable* relief traditionally used by the courts." *Amici* Bf., p. 46 (emphasis in original). Although, to be sure, courts of equity do grant relief by way of damages under the maxim, "Equity delights to do justice and not by halves," see *Rozelle* v. *Connecticut Gen. Life Ins. Co.*, 471 F.2d 29, 31 (10th Cir. 1972) *cert. den.* 411 U.S. 921 (1973): such relief is granted merely to avoid a multiplicity of actions. Walsh on Equity, p. 107 (1930). See *Angoff* v. *Goldfine*, 270 F.2d 185, 190-191 (1st Cir. 1959). It is never awarded where damages would not be recoverable at law or by statute. *Codman* v. *Wills*, 331 Mass. 154, 159 (1954). See *United Railroads of San Francisco* v. *San Francisco*, 249 U.S. 517, 521-522 (1919). For reasons stated in Petitioners' Bf., at pp. 20-26, damages are no part of the award contemplated by EHA.

An argument repeatedly advanced is that if a court cannot award retroactive damages in a (e)(2) case, the passage of time between rejection of an IEP and a final adjudication will make any other action that a court may take inefficacious. Dept. Bf., pp. 53-54, 60, 63, 88-91; Panicos' Bf., pp. 41-42, 43, 56, 78-80, 86, 89-91; *Amici* Bf., pp. 31-33, 50-55. All three briefs point to the six-year period that will probably have elapsed between the rejection of the IEP and the mandate of this Court and ask this Court to assume that this is the normal period in EHA cases. Petitioners point out, however, that even though this case occasioned three appeals to the First Circuit between entry and trial, and even though some delay was occasioned by both respondents' changes of counsel, see D.Ct. Docket Entries 241, 242, 258, 261, 262, trial was actually completed within three years of the rejection of the IEP. Other cases should go through the courts more rapidly.

However that may be, few cases in which there is judicial review are, as Congress must have been aware when it enacted (e)(3), likely to be over before a planned placement takes effect. Local or State educational agencies may at any time

agree with the parents on a new placement while proceedings are pending, and one may assume that in many, but not necessarily all, cases where, as here, the parents prevail at the BSEA level, the State agency will, if it has appropriate machinery in place, see Petitioners' Bf., n.41 at p. 44, agree to interim placement in the placement approved by the hearing officer. If the parents do not prevail or if they do but can obtain no agreement as to interim placement under (e)(3), a court may, conceivably, grant preliminary relief if it is convinced that the child is suffering irreparable harm. See Petitioners' Bf., pp. 49-51. In most cases, however, in the absence of an agreement for interim change of placement, the child should under (e)(3) remain in his then current placement while administrative and judicial proceedings are pending. Where sufficient opportunities exist to convince local and State educational authorities or a court that an interim change of placement is required, courts do not have to be given the power to order reimbursement of tuition to make EHA effective.[8]

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[8] At page 45, n.12, the Panicos cited numerous cases that supposedly support their position as the prevailing view. A review of the cases proves the extravagance of their claim. Thus, in *Gary A.* v. *New Trier High School Dist. No. 203*, 1983-1984, EHLR DEC. 555: 376, 381 (N.D. Ill. 1984), the court observed that "when the relief sought under the EAHCA stems from a dispute over the appropriate substantive content of a child's education, or the proper placement in a particular environment, recourse is limited. Neither reimbursement damages, injunctive compensatory relief, or even the prospective injunction placement change sought in *Rowley* is available." In *Hall* v. *Vance*, 1983-84 EHLR DEC. 555:437, 442 (E.D.N.C. 1983) the following language appears: "Where the local educational agency meets the statutory requirements, the duty created by *Stemple* [v. *Board of Education*, 623 F.2d 893] falls into place . . . the duty to keep the child in the current educational placement attaches upon identification." *Id.* at 443 one finds this statement: "[W]here the parents take unilateral action in the face of the vast procedures designed to ensure an appropriate education, any right to reimbursement is waived." Ultimately these cases, on the facts of the present case, do not support respondents' position. At p. 49, n.14 of the Panicos' brief *Hall* v. *Vance* is cited for having "facts strikingly similar" to the present case. On the contrary, the District Court in that case found the following: that for many years there was no compliance with the procedural requirements of EHA by the local educational agency and James Hall's case was not an isolated incident; that the failures of the local

Conclusion.

For the reasons given herein and in petitioners' original brief, the judgment should be reversed and the case remanded to the Court of Appeals with instructions to order the parents to reimburse petitioners as required by the judgment of the District Court.

Respectfully submitted,

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agency were egregious and thus constituted bad faith; that the previous IEP's did not provide an education reasonably calculated to enable the plaintiff to receive educational benefits; and that in fact the prospective IEP under all the circumstances was similarly inadequate. Indeed, in none of the cases cited in n.12 was an IEP rejected by the parents found to be adequate after a trial in the district court.